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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

EUGENE duPONT III,
Petitioner,

v.

SOUTHERN NATIONAL BANK OF HOUSTON, JOHN H. GARNER, EDWARD J. BRADY, EUGENE duPONT IV, DAPHNE BURMA VAUGHAN and BENJAMIN FRANKLIN VAUGHAN IV,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a party must object to a limited ruling on a Fed. R. Civ. P. 41(b) motion at the time of the ruling in order to preserve error?

2. Whether a party must make an offer of proof after a limited ruling on a Fed. R. Civ. P. 41(b) motion in order to preserve error?

3. Whether judgment may be entered *sua sponte* in favor of a plaintiff after the defendant has made a motion for judgment under Fed. R. Civ. P. 41(b)?

4. Whether a trustee may be removed for hostility if one of the bases for hostility is the litigation seeking removal of the trustee?

5. Whether under Texas law a Trustee's litigation expenses in defending a suit brought by an income beneficiary may be allocated to income where the trust instrument has specific provisions governing allocation of expenses and the settlor's intent is that the expenses be allocated to principal and where there were no findings relating to whether the income beneficiary was justified in bringing the action?

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 575 F. Supp. 849 (S.D. Tex. 1983) (Appendix "A").

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ____F.2d____ (5th Cir. 1985) (Appendix "B").

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 22, 1985. A timely filed Petition for Rehearing was denied on November 4, 1985. This Petition for Writ of Certiorari is filed within ninety (90) days of that date. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1254 (1) and 2101(c).

STATUTES INVOLVED

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By way of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1332(a):

The text of 28 U.S.C. § 1332(a) is set forth in Appendix "C".

28 U.S.C. § 2101(c):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Federal Rule of Civil Procedure 41(b):

The text of Rule 41(b), Fed. R. Civ. P., is set forth in Appendix "D".

Federal Rule of Civil Procedure 46:

The text of Rule 46, Fed. R. Civ. P., is set forth in Appendix "E".

Federal Rule of Civil Procedure 54(c), in pertinent part:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Federal Rule of Evidence 103(a):

The pertinent text of Rule 103(a), Fed. R. Evid., is set forth in Appendix "F".

Federal Rule of Evidence 403, in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . the danger of needless presentation of cumulative evidence.

Texas Revised Civil Statutes, Article 7425b-26:

The text of Article 7425b-26, Tex. Rev. Civ. Stat., is set forth in Appendix "G".

Texas Revised Civil Statutes, Article 7425b-36, in pertinent part:

> All other expenses, . . ., unless due to the fault or cause of the tenant, . . ., shall be paid out of principal.

STATEMENT OF THE CASE

In December 1972, Eugene duPont III ("duPont III") created a discretionary inter vivos Trust for the purpose of obtaining certain federal tax benefits. The Trust was established on the advice of Edward J. Brady ("Brady"), a close friend, attorney and tax counselor of duPont III. The Trust instrument provided for discretionary distributions of income to duPont III during his lifetime, and at his death, to his son, duPont IV, and to his wife Joanne duPont if she was still married to duPont III at the time of his death. It appointed Brady and Southern National Bank of Houston, Texas ("Southern National") as Trustees.[1] By its terms, the Trust was governed by Texas law.

The Trust property consisted of two assets: 20,000 shares of General Motors stock and 14,000 shares of duPont stock. In 1973, duPont III signed several disputed documents purporting to transfer two additional properties to the Trust: the Nemours Plantation (an 8,600 acre farm in South Carolina) and a limited partnership interest in the Harridge House (an apartment building in New York City). The deed to the Nemours Plantation was never formally delivered to the Trustees; the partnership interest in the Harridge House was never assigned to the Trustees in accordance with either the limited partnership agreement or the laws of the State of New York. Neither transfer was for consideration.

After receiving correspondence between Southern National and Brady in late 1977, duPont III became suspicious about the actual federal tax consequences of the

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1. John H. Garner was appointed as a Trustee after he resigned his position at Southern National.

Trust and the purported donative transfers. duPont III's suspicions were based in part on Brady's failure to file any documents relating to duPont III's gifts to the Trust and Brady's failure to effectuate a transfer of title of certain real and personal property including the Nemours Plantation and the Harridge House. In order to verify his suspicions, duPont III retained independent counsel to advise him on the tax implications of the Trust. Based on the advice he received, duPont III refused to execute a deed to the Nemours Plantation presented by Brady, declared that it was his intent not to deliver title and refused to complete the property transfers initiated in 1973.

In June 1981, duPont III brought suit in federal district court[2] against the Trustees and various income and contingent beneficiaries and remaindermen of the Trust. He sought to have the Trust revoked or, alternatively, to have the incomplete transfers of the Nemours Plantation and the Harridge House declared invalid. Additionally, he sought removal of the Trustees on the ground of hostility. duPont IV and the Trustees filed counterclaims for a declaratory judgment to validate the disputed property transfers.

At the conclusion of duPont III's case, the defendants filed a motion for judgment under Rule 41(b) of the Federal Rules of Civil Procedure ("Rule 41(b) Motion"). Their motion explicitly included the validity of the Trust *and* the effectiveness of the transfers of the Nemours Plantation and the Harridge House. Limiting its ruling to the validity of the Trust, the district court stated:

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2. Jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a).

> I have heard the evidence and find as a fact that the *purposes of this Trust have not been frustrated,* because I think the purposes of it were accomplished. I don't think we have a situation here other than that, from the evidence. I find as a fact that it is more likely than not true that Mr. duPont knew exactly what he was doing when he did this and he simply changed his mind, so I am going to grant the motion. We will be in adjournment. (emphasis added).

No mention was made of the transfers of property to the Trust; the only issue mentioned in the oral ruling was the validity of the Trust. Defendants, therefore, should have been aware that the court was only partially granting their Rule 41(b) Motion.

Ten months later, when the district court issued its Findings of Fact and Conclusions of Law, it affirmed its oral ruling that the Trust was valid. *duPont v. Southern Nat'l Bank of Houston, Texas,* 575 F.Supp. 849, 859-63 (S.D. Tex. 1983). In addition, it held that the transfers of the Nemours Plantation and the Harridge House were ineffective. 575 F. Supp. at 865-66. The court also held that the Trustees could not be removed for hostility and that the Trustees could charge their litigation expenses to the income portion of the Trust. 575 F. Supp. at 863-65.

After the district court issued its Findings of Fact and Conclusions of Law, the defendants moved for a new trial on the ground that they were denied an opportunity to present all their evidence. The district court denied the defendants' motion without comment on December 22, 1983.

On appeal, the defendants claimed that the district court erred by granting judgment in favor of duPont III *sua sponte*. They again argued that the district court's action denied them the opportunity to present all their evidence. In addition, the defendants, for the first time, argued that the district court's action violated their constitutional right to due process of law. duPont III, on cross-appeal, contested, among other things, the district court's holdings on the validity of the Trust and on the allocation of the Trustees' litigation expenses.

The court of appeals vacated and remanded the portion of the district court's opinion that declared the property transfers invalid. It held that it was improper for the district court to grant judgment in favor of plaintiff on defendants' Rule 41(b) Motion. *duPont v. Southern Nat'l Bank of Houston, Texas,* 771 F.2d 874, 880 (5th Cir. 1985). According to the court, such procedure not only runs contrary to the requirements of Rule 41(b) of the Federal Rules of Civil Procedure ("Rule 41(b)"), but it also runs afoul of the Due Process Clause of the United States Constitution. *Id.*

The court of appeals upheld the portion of the district court's opinion that denied removal of the Trustees for hostility. It held that a trustee could not be removed for hostility if the hostility was created in part by litigation initiated by the beneficiary to effectuate removal of the trustee. *duPont,* 771 F.2d at 885. It also upheld the portion of the district court's opinion that allocated the Trustees' litigation expenses to the income portion of the Trust. *duPont,* 771 F.2d at 887.

ARGUMENT

I.

THE COURT OF APPEALS' CONSIDERATION OF THE DEFENDANTS' OBJECTION TO THE DISTRICT COURT'S ORAL RULING IS A VIOLATION OF FRCP 46

In order to preserve an erroneous ruling or order for appeal, a party must object to the order or ruling at the time it is made and must set forth the grounds for his objection. Fed. R. Civ. P. 46 ("Rule 46"). He may not speculate on the outcome of the case by letting error go unnoted and then seek a new trial on the basis of the error if the outcome of the case is unfavorable. *Occidental Petroleum Corp. v. Walker,* 289 F.2d 1, 5 (10th Cir. 1961); *Fort Worth & Denver Ry. Co. v. Harris,* 230 F.2d 680, 682 (5th Cir. 1956); *Reck v. Pacific-Atlantic S.S. Co.,* 180 F.2d 866, 870 (2d Cir. 1950). Without a definite and timely objection, courts may only consider fundamental error. *Helvering v. Rubenstein,* 124 F.2d 969, 972 (8th Cir. 1942); *National Fire Ins. Co. v. Sequoyah County, Oklahoma,* 115 F.2d 232, 234 (10th Cir. 1940). Fundamental error has been defined as an error that goes to the foundation of a claim, or part of it, and is not curable. *National Fire Ins. Co.,* 115 F.2d at 234.

The district court's oral ruling was clear and unambiguous. It granted the defendants' Rule 41(b) Motion on the issue of the validity of the trust and said nothing about the effectiveness of the transfers of the Nemours Plantation and the Harridge House. The defendants did not raise any objections to this ruling at the hearing nor did they request any clarification of the ruling. Instead,

they chose to speculate on the outcome of the case by withholding their objection until after the court had issued its written opinion.

Once the defendants finally did object to the district court's oral ruling, they made no mention whatsoever of the constitutional protection of due process. It was not until appeal that the defendants claimed that the district court's ruling denied them their right to due process of law.

Despite the defendants' tardy objection and despite their even tardier due process argument, the court of appeals held that the granting of judgment *sua sponte* in favor of duPont III denied the defendants their right to due process under the Constitution. *duPont,* 771 F.2d at 880. As authority for this proposition, the court relied primarily on *Carter v. Morehouse Parish School Board,* 441 F.2d 380 (5th Cir.), *cert. denied,* 404 U.S. 880 (1971). This basis of the court's decision is without merit.

Carter was concerned with the wrongful termination of a teacher. In *Carter,* the district court orally ruled, at the conclusion of the plaintiff's case, that the plaintiff's dismissal had been improperly based on a test designed for sixth graders. In order to clarify the ruling, the defendants specifically asked the court if it also found that the dismissal had been based on discrimination. The court replied that it did not. In reliance on this ruling, the defendants chose not to present evidence on the issue of discrimination. When the formal judgment was entered, the court, contrary to its statements in the oral ruling, held that the plaintiff's dismissal had been improperly based on discrimination rather than on the test for sixth graders.

Carter is distinguishable from the present case in several material respects. First, in *Carter,* the court's written opinion was directly contrary to its oral ruling. Here, however, the court's written opinion was not in conflict with its oral ruling. Second, the defendants in *Carter* took affirmative action to clarify the court's ruling. In contrast, the defendants here took no steps whatsoever to clarify the court's oral ruling. Third, in *Carter* the defendants had not presented any evidence at all on the discrimination issue. In this case, however, the defendants had already presented substantial evidence on the purported transfers of the Nemours Plantation and the Harridge House. No indication exists in the record that the defendants had any additional evidence to offer at trial.

More important, the court's holding is a violation of Rule 46, Fed. R. Civ. P. If the defendants had objected to the district court's ruling at the hearing and had set forth fully their grounds for objecting, as required by Rule 46, the court could easily have cured any error that existed. By failing to do so, however, the defendants waived their right to raise the error on appeal.[3] Fed. R. Civ. P. 46. The court of appeals' improper consideration of the defendants' objections can only be cured if this Court grants this Petition for Writ of Certiorari.

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3. Even if the defendants did timely object to the court's ruling, which they did not, they would still be precluded from raising the due process argument for the first time on appeal.

II.

THE COURT OF APPEALS' HOLDING THAT THE DEFENDANTS DID NOT HAVE TO MAKE AN OFFER OF PROOF IN ORDER TO PRESERVE ERROR IS A VIOLATION OF FRE 103(a)

District courts have the authority under Rule 403 of the Federal Rules of Evidence ("Rule 403") to exclude cumulative evidence. Fed. R. Evid. 403. They have considerable latitude, even with admittedly relevant evidence, in excluding that which is cumulative. *Hamling v. United States*, 418 U.S. 87, 127 (1974). A party cannot object to the exclusion of cumulative evidence unless a substantial right is effected and the party objects in a timely manner to the exclusion and makes known to the court the substance of the excluded evidence. Fed. R. Evid. 103(a) ("Rule 103(a)").

In the court of appeals, duPont III argued that the district court's decision to render judgment without hearing additional evidence was a reasonable exercise of its authority to exclude cumulative evidence and that the defendants failed to make an adequate offer of proof. The court of appeals responded by saying that duPont III's argument is without merit because "the appellants never had an opportunity to introduce numerous exhibits into evidence and ten of the witnesses listed in their pre-trial order never testified for either side." *duPont*, 771 F.2d at 880. The court of appeals' response completely misses the point. The question at issue was not whether the district court erroneously excluded the defendants' evidence. The question at issue was whether the defendants properly preserved the issue for appeal. duPont III argued that the vague and conclusory affidavits presented by the defend-

ants were insufficient to preserve error. Neither the appellants nor the court of appeals responded to this argument.

By failing to address this crucial issue, the court of appeals effectively ruled that the defendants were not required to have made an offer of proof in order to preserve the district court's alleged wrongful exclusion of evidence for appeal. Such a holding is in direct conflict with the requirements of Rule 103(a).

III.

THE COURT OF APPEALS' HOLDING THAT THE DISTRICT COURT COULD NOT ENTER JUDGMENT *SUA SPONTE* IN FAVOR OF duPONT III CONFLICTS WITH EXISTING AUTHORITY

Although no court has yet ruled directly on the issue presented here, there is a growing trend among the circuit courts to allow the district courts to grant summary judgment *sua sponte* in favor of a nonmoving party if the opposing party has moved for summary judgment and at the hearing it appears from papers, affidavits and other proofs submitted that there is no genuine issue of material fact and that judgment for the nonmoving party would be appropriate as a matter of law. *See Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 311 (9th Cir. 1982); *Memphis Trust Co. v. Board of Governors of the Federal Reserve System,* 584 F.2d 921, 924 (6th Cir. 1978); *Lowenschuss v. Kane,* 520 F.2d 255, 261 (2d Cir. 1975); *Procter & Gamble Independent Union of Port Ivory v. The Procter & Gamble Manufacturing Co.,* 312 F.2d 181, 183-84 (2d Cir. 1962), *cert. denied,* 374 U.S. 830 (1963); *Local 33, Int'l Hod Carriers Bldg. & Common Labor-*

ers' Union of America v. Mason Tenders Dist. Counsel of Greater New York, 291 F.2d 496, 505 (2d Cir. 1961); *White v. Fleming*, 374 F. Supp. 267, 270 (D.C. Wis. 1974); *aff'd on the merits*, 522 F.2d 730 (7th Cir. 1975); *Highway Truck Drivers & Helpers Local 107 v. Roadway Express, Inc.*, 266 F. Supp. 868, 870 (E.D. Pa. 1966), *aff'd per curiam*, 377 F.2d 552 (3d Cir. 1967).

Judge Charles E. Clark, one of the original draftsmen of the Federal Rules of Civil Procedure, fully supports this position:

> [T]he trend of rulings in the district courts is to hold the formal motion [for summary judgment] unnecessary. This is an instance where, seemingly, the judges on the firing line have reached a better result than that suggested by inhibitions of the drafting committee.

Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567, 570-71 (1952).

As indicated by Judge Clark, the use of *sua sponte* summary judgment is desirable from a policy standpoint. Not only does it expedite justice by preventing the use of dilatory tactics and specious denials, but it also helps alleviate the enormous pressure on today's court dockets. Moreover, it enables courts to fulfill the requirements of Rule 54(c), Fed. R. Civ. P., which requires courts to grant the relief to which a party is entitled "even if the party has not demanded such relief in his pleadings." As Judge Friendly stated in *Local 33, Int'l Hod Carriers Bldg. & Common Laborers' Union of America*, "it is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would

have been made had defendant made a cross-motion for summary judgment." *Local 33, Int'l Hod Carriers Bldg. & Common Laborers' Union of America,* 291 F.2d at 505.

Procedurally, motions to dismiss for insufficiency of evidence pursuant to Rule 41(b) are similar to motions for summary judgment. Both require the judge to determine whether on the law applicable to the established facts the movant is entitled to judgment. *See Commercial Iron & Metal Co. v. Bache & Co.,* 478 F.2d 39, 41 (10th Cir. 1973); *Kirk v. Home Indemnity Co.,* 431 F.2d 554, 559 (7th Cir. 1970); Fed. R. Civ. P. 41(b). Thus, in Rule 41 (b) Motions, as in motions for summary judgment, it is desirable to allow the district courts to grant judgment *sua sponte* in favor of the nonmoving party.

More than three decades ago, this Court declined an opportunity to rule on the issue of whether courts could grant summary judgment *sua sponte* in favor of one party after the opposing party had moved for summary judgment. *Fountain v. Filson,* 336 U.S. 681, 682-83 (1949). Since that time, the circuit courts that have ruled on the issue have uniformly held that courts may grant summary judgment *sua sponte* in such situations. For the reasons discussed above, this trend is desirable. Now, however, in an *analogous* situation, the court below has ruled that courts may not grant judgment *sua sponte* in favor of a plaintiff after a defendant's Rule 41(b) Motion. *duPont,* ___F.2d at ____. This trend would not be desirable, for it would place form before substance and would deny litigants the relief to which they are entitled. To prevent this from happening, this Court should not again decline an opportunity to rule.

IV.

THE COURT OF APPEALS' HOLDING THAT THE TRUSTEES COULD NOT BE REMOVED FOR HOSTILITY CONFLICTS WITH THE TEXAS SUPREME COURT'S HOLDING IN *AKIN* AS WELL AS WITH OTHER EXISTING AUTHORITY

The court of appeals upheld the district court's denial of duPont III's request to remove the Trustees because the court of appeals could not "sanction the creation of hostility by a beneficiary in order to effectuate the removal of a trustee." *duPont,* 771 F.2d at 885, citing *Akin v. Dahl,* 661 S.W.2d 911 (Tex. 1983), *cert. denied,* ____U.S.____ (1984). The court of appeals' holding is in conflict with the Texas Supreme Court's decision in *Akin* as well as with other existing authority.

In *Akin,* the trust beneficiary relied *solely* on the litigation between the parties as his basis for removal of the trustee. *Akin,* therefore, stands for the proposition that a trustee cannot be removed for hostility if the hostility is created *solely* by litigation initiated by the beneficiary to effectuate removal of the trustee. It does not, as the court of appeals holds, stand for the proposition that a trustee cannot be removed for hostility if the hostility is created *in part* by litigation initiated by the beneficiary to effectuate removal of the trustee.

At trial, duPont III offered substantial evidence relevant to the issue of hostility. The court of appeals, and the district court, however, chose only to consider the present litigation as grounds for removal. Accordingly, on remand

of this case, the district court should be required to consider *all* the factors concerning hostility that were adduced at trial:

(1) the charge of excessive trustee fees which reduced the amount of income distributed to duPont III (Day, pp. 8-10, 14-15, 18-19, 30-31);

(2) the haphazard and retroactive valuation of trust assets, directly affecting the amount of trustee compensation and income distributed to duPont III (Sweeney, pp. 14-20, 37-38; Day, pp. 19-24, 26-29);

(3) the mismanagement of trust assets by failing to perfect title in personal property and real estate (Brady, pp. 7-12, 65-104);

(4) the failure to file gift tax returns, as required by Internal Revenue Code § 6075(b), on the alleged conveyance of assets (Brady, pp. 41-42; Sweeney, pp. 30-31; Plaintiff's Exhibit No. 21); and

(5) the failure to pay gift taxes, to file a gift tax return, as required by Internal Revenue Code § 6075(b), and to arrange for taxes to be paid from assets of the Trust (Brady, pp. 40-42, 75; Plaintiff's Exhibit No. 32).

Each of these factors justifies removal under the guidelines established by *Brault v. Bigham*, 493 S.W.2d 576 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (removal on basis of personal relations justified where hostility substantially interfered with proper administration of trust). The defendants clearly benefited from their wrongful calculation of trustees' fees, and duPont III and the Trust will undoubtedly suffer as a result of their mishandling of tax matters and improper manipulation of assets.

Decisions from other jurisdictions also demonstrate that the removal of a trustee for hostility may be justified on the basis of his personal relations with the beneficiaries if the hostility substantially interferes with proper administration of the trust. *See Cooney v. Montana,* 196 N.E. 2d 202 (Mass. 1964); *Gordon v. Gordon,* 124 N.E. 2d 236 (Mass.), *cert. denied,* 349 U.S. 947 (1955); *Pedroja v. Pedroja,* 102 P.2d 1012 (Kan. 1940); *Wilson v. Wilson,* 14 N.E. 521 (Mass. 1888). *See also, Moore v. Sanders,* 106 S.W.2d 337 (Tex. Civ. App.—San Antonio 1937, no writ). In addition, decisions from other jurisdictions demonstrate that removal for hostility may be based on other grounds as well. For instance, removal for hostility may be based on an acrimonious relationship which causes the trustee to take actions which are inconsistent with the trust's purpose. *See Kadison v. Horton,* 78 A.2d 136 (N.J. 1950). In fact, in some situations, extreme hostility alone may justify the removal of a trustee for hostility. *See Brown v. Batt,* 631 P.2d 1346 (Okla. 1981).

The court of appeals gross misstatement of state law, if allowed to stand, would effectively preclude the removal of trustees for hostility when litigation inevitably is involved. Litigation by its very nature fosters hostility between opposing parties. Thus, every time a beneficiary attempted to remove a trustee for hostility, courts would summarily deny him or her relief on the ground that the hostility was created in part by litigation initiated by the beneficiary to effectuate removal of the trustee. To prevent this from happening, this Court should grant this Petition for Writ of Certiorari.[4]

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4. The numerous errors committed in the court of appeals accumulated, in part, because Judge Goldberg was overwhelmed by his own prose and because the court of appeals misconstrued many

V.

THE COURT OF APPEALS' HOLDING CONCERNING THE ALLOCATION OF TRUSTEES' LITIGATION EXPENSES IS IN CONFLICT WITH TEXAS LAW

Relying on Article 7525b-36 of the Texas Revised Civil Statutes ("Article 7525b-36"), the court of appeals upheld the district court's holding that the Trustees could allocate their litigation expenses solely to the income portion of the Trust. *duPont,* 771 F.2d 887. The court of appeals' holding is in direct conflict with existing authority.

The Trust instrument contains specific provisions regarding the allocation of receipts and disbursements. It provides that:

> The trustees may exercise discretion (i) in determining whether expenditures shall be charged to and whether receipts shall be credited to income or principal or apportioned between them; (ii) in deciding whether and to what extent to create reserves out of income to preserve the value of the principal producing the income (including, without limitation, reserves for depreciation, depletion, and amortization) and reserves to meet not only present but anticipated expenses and other disbursements chargeable to income; and (iii) in deciding whether to make

---

essential facts in the trial record. For instance, the panel opinion cited, as the primary basis for decision, duPont III's failure to present his argument to the district court. Slip Opinion, p. 6975 n.11. duPont III, however, offered substantial evidence at trial, without objection, to support his contentions that removal is required for "improper Trust administration" (p. 9) and is warranted because the Trustees "abused their fiduciary duties" (p. 10). Joint Pre-Trial Order, pp. 9-10. Certainly proof of mismanagement, arbitrary valuation of trust assets and excessive trustee fees are within those contentions.

> expenditures from income equitably chargeable to principal or to make expenditures from principal equitably chargeable to income; provided, however, income and principal shall reimburse each other for these advances within a reasonable time after they are made.
>
> * * * *
>
> When a trustee is empowered to exercise his judgment or discretion, it shall be exercised *reasonably* and in good faith with a view toward assuring to the successive beneficiaries full enjoyment of their respective interests and *not for the purpose of arbitrarily favoring one over the other.* (emphasis added).

Because the Trust contains these provisions, the Texas Trust Act does not apply. Tex. Rev. Civ. Stat. art. 7425b-26 (Vernon 1960). The court of appeals' reliance on Article 7425b-36, therefore, constitutes a misapplication of Texas law.

Instead of relying on Article 7425b-36, the court of appeals should have looked at duPont III's intent in determining how to allocate the Trustees' litigation expenses. *See Cutrer v. Cutrer,* 162 Tex. 166 (1961). By examining the settlor's intent, the court would have found that duPont III set up the trust to avoid or minimize his tax liability while maintaining a flow of income throughout his life. Based on this intent, the district court should have allocated the Trustees' litigation expenses to the principal portion of the trust, instead of to the income portion.

Moreover, even if the court of appeals did properly rely on Article 7425b-36, the court did not apply the test

required by the provisions of that rule. As the court appeals recognizes, litigation expenses generally are pa from trust principal "*unless* [the expense is] due to t fault or cause of the [income beneficiary]." Tex. Re Civ. Stat. art. 7425b-36. The district court sustained least two portions of duPont III's case: (a) payment excessive trustee fees and (b) defective conveyance two substantial assets. Appeal of the allocation of litig tion expenses, therefore, was justified, and not, in t panel's words, "belated and essentially meritless." S Opinion, p. 6978.

If the court of appeals' reliance on Article 7425b- was proper, the court of appeals, on remand, shou direct the district court to apply the proper test esta lished by Texas law and make specific findings on wheth the litigation was due to the cause or fault of duPont or was a justified action to clarify property transfers a recover excessive trustee fees. If the action was justifie the expenses must be allocated to trust principal, n income. Tex. Rev. Civ. Stat. art. 7425b-36.

Because the court of appeals failed to follow Tex law by ordering an improper allocation of the Truste litigation expenses, this Court should grant this Petiti for Writ of Certiorari. To do otherwise would do a gre injustice to the most sacred consideration in proper tru administration: the settlor's intent.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the judgment below.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been forwarded to opposing counsel by certified mail, return receipt requested, on this the 31st day of January, 1986.

/s/

SEARCY BRACEWELL

APPENDICES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

EUGENE duPONT III,
Petitioner,

v.

SOUTHERN NATIONAL BANK OF HOUSTON, JOHN H. GARNER, EDWARD J. BRADY, EUGENE duPONT IV, DAPHNE BURMA VAUGHAN and BENJAMIN FRANKLIN VAUGHAN IV,
Respondents.

APPENDICES

APPENDIX A

Eugene duPONT III,
Plaintiff,

v.

SOUTHERN NATIONAL BANK OF HOUSTON, TEXAS, Trustee, et al.,
Defendants.

Civ. A. No. H-81-1546.

United States District Court,
S.D. Texas,
Houston Division.

Sept. 27, 1983.

Settlor of inter vivos trust brought action seeking rescission, or revocation or modification of trust and removal of trustees. The District Court, Sterling J., held that: (1) trust could not be rescinded or revoked on ground of mistake in inducement; (2) revocation or modification of trust was not warranted; (3) evidence did not support removal of trustees; (4) settlor was not entitled to attorney fees; (5) base for computation of trustees' fees should include shares of cooperative apartment located in New York; (6) transfers of stock certificate to trust were effective and complete; (7) transfers of settlor's interest in partnership which owned apartment and of plantation property were not effective; and (8) life interest beneficiary was not entitled to litigation expenses.

Order accordingly.

J. Clifford Gunter III, Bracewell & Patterson, Hous
Tex., for plaintiff.

A. Hoyt Rowell, III, Gibbs, Gaillard & Rowell, Cha
ton, S.C., Margaret Irene Jones, John duPont Wat
Virginia Irene Waters, Florence, S.C., Duncan E.
borne, John T. Anderson, Graves, Dougherty, Hea
Moody & Garwood, Austin, Tex., Frank B. Davis,
drews & Kurth, Houston, Tex., Robert A. Gwinn, J
D. Johnson, Johnson, Bromberg & Leeds, Dallas, T
Ronald L. Palmer, Baker & Botts, Houston, Tex., Ge
J. Goldsborough, Jr., Goldsborough, Franch & Col
P.A., Easton, Md., H. Lee Godfrey, Wood, Campl
Moody & Gibbs, Houston, Tex., for defendants.

Leslie Dudley Myrin, pro se.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STERLING, District Judge.

This is a civil action brought by Plaintiff Eugene duP
III against the trustees, income and contingent bene
aries and remaindermen of an *inter vivos* trust created
Plaintiff on December 14, 1972, seeking, *inter alia*
have the Court rescind, revoke or modify the trust.
case was tried to the Court. At the close of Plaint
evidence Defendants Southern National Bank of Hous
John H. Gardner, Edward J. Brady and Eugene duP
IV moved for dismissal of the action pursuant to F
41(b), Fed. R. Civ. P. After considering the weight
credibility of the evidence and the argument of the par
the Court granted the motion for Defendants on the i
of validity of the trust, but found that trustee fees w
improperly calculated. The Court enters the follow

findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Findings Of Fact

A. The Parties and Issues.

1. Plaintiff, Eugene duPont III ("duPont III"), is a resident of the State of Florida. Plaintiff is settlor of an *inter vivos* trust under an agreement dated December 14, 1972 ("Trust").

2. Defendant, Southern National Bank of Houston, Texas ("SNB"), is a banking corporation with its offices in Houston, Harris County, Texas. SNB is the corporate trustee under the Trust and is a party to this action in its capacity as trustee.

3. Defendant, Edward J. Brady ("Brady"), is a resident of the State of New York. Brady is a trustee under the Trust and is a party to this action as trustee.

4. Defendant, John H. Garner ("Garner"), is a resident of the State of Texas. Garner was an officer of SNB and subsequent to his resignation from SNB was appointed as an individual trustee under the Trust. He is a party to this action as trustee.

5. Defendant, Eugene duPont IV ("duPont IV") resides in the State of Maryland and is the minor son of Plaintiff and a former wife, Joanne A. duPont. He is a life income beneficiary under the Trust.

6. Defendant, Margaret Irene Jones ("Jones"), is a daughter of Plaintiff and a contingent beneficiary and remainderman under the Trust. Jones is a resident of the State of South Carolina.

7. Defendant, Daphne Burma Vaughan ("Vaughan" is a daughter of Plaintiff and a contingent beneficiary a remainderman under the Trust. Vaughan is a resident the State of Texas.

8. Defendant, Leslie Dudley Myrin ("Myrin"), is daughter of Plaintiff and a contingent beneficiary a remainderman under the Trust. Myrin is a resident the State of Wyoming.

9. Defendant, Genette Lee duPont ("Genette d Pont"), is a contingent beneficiary and remainderm under the Trust. Genette duPont is a resident of t State of South Carolina.

10. Defendants, John duPont Waters ("John Waters" Virginia Irene Waters ("Virginia Waters"), Benjam Franklin Vaughan IV ("Benjamin Vaughan IV"), Cu bert Latta Myrin, Jr. ("Cuthbert Myrin"), and Mi duPont Myrin ("Mimi Myrin"), are the grandchildr of Plaintiff and are contingent beneficiaries and remai derman under the Trust. John Waters and Virginia Wate reside in Florence, South Carolina. Benjamin Vaughan I resides in Austin, Texas. Cuthbert Myrin and Mimi Myr are minor grandchildren of Plaintiff who reside in Jackso Wyoming.

11. In his original complaint, duPont III brought th action seeking to have the Court rescind or revoke t Trust on the grounds (1) that he created the Trust bas on a mistake of fact and law—specifically, that the tra action would not be subject to federal transfer taxe (2) that the purposes for which he created the Trust ha become frustrated and impossible to accomplish; (3) th through no fault of his own, the Trust was never fu consummated; and (4) that the Trust was improvident

created by him.[1] Alternatively, duPont III seeks to have the Trust modified and reformed to include a marital deduction clause, a by-pass trust or a tax allocation clause.

12. In a motion to amend the complaint, which was granted by the Court on November 9, 1982, as a motion to supplement pleadings, Plaintiff sought to have the Court remove Brady and Gardner as trustees on the grounds that there is hostility between these trustees and Plaintiff and that they no longer render beneficially active services to the Trust. Additionally, Plaintiff supplemented his complaint to allege that the trustees incurred excessive, duplicative and unnecessary legal fees to defend this action. Additionally, Plaintiff contends that the legal fees, which were charged to the income account of the Trust, should have been allocated between the corpus and income accounts.

13. In his answer, duPont IV counter-claimed alleging that the Trust is valid and enforceable and seeking to have the Court order duPont III to transfer to the Trust all properties in his possession and under his control which are the subject of the Trust; award punitive damages because Plaintiff's allegations are wanton, malicious and unfounded; and award reasonable attorney fees for this action.

---

1. The gravamen of Plaintiff's argument rests on the fact finding that his primary purpose for creating the trust was to minimize transfer taxes. In light of the Court's finding that this was not his motive, Plaintiff's arguments (1) that through no fault of his own, the Trust was never fully consummated; (2) that the purposes for which he created the Trust have become frustrated and impossible to accomplish; and (3) that the Trust was improvidently created are by implication unsupported by the record when drawing all inferences in favor of Plaintiff from the evidence introduced at trial.

B. *Validity Of the Trust.*

14. On December 14, 1972, duPont III created
inter vivos trust naming Brady and SNB as co-truste
After the Trust was established Garner resigned his po
tion at SNB and, at duPont III's request, was appoint
a co-trustee.

The dispositive provisions of the Trust provide
successive life estates in duPont III, as settlor, and
son duPont IV, followed by a contingent remainder
certain descendants of the settlor. During settlor's li
time, the trustees are authorized to distribute at th
sole discretion all or any part of the income of the Tr
to the settlor. Since the Trust was created, the trust
have made discretionary payments of the entire inco
account to duPont III.

15. The gravamen of Plaintiff's argument is premis
on the factual contention that his primary motive
creating this Trust was to minimize the ultimate tra
fer tax liability incurred by his estate upon his deat
The Court, however, disagrees with Plaintiff's contenti
concluding that on the basis of the evidence, duPont II
primary, if not exclusive, purposes in creating the Tr
were (1) to prevent Joanne A. duPont, his former spou
from obtaining duPont III's property in the event
divorce and (2) to provide for duPont IV on an econon
level equal to that which had already been provided
duPont III's children by previous marriages.

---

2. Plaintiff does not dispute the motive of creating the Trust
the benefit of duPont IV, but he contends that this motive
creating the trust is inextricably intertwined with minimizing trans
taxes on his estate.

This finding is based on weighing the credibility of the evidence and drawing relevant inferences from the following:

(a) The testimony of Brady, duPont III's former lawyer and confidant which the Court finds clear and convincing. Brady testified that he began discussing formation of the Trust with duPont III in February, 1972, and that the purpose for the Trust was not transfer tax considerations but was "to keep the property away from Joanne duPont." This position was confirmed in a third party memorandum dated October 26, 1972, prepared by Edward W. Turley, Jr., who at the time was a partner in a Houston law firm, indicating that it was his understanding "that Mr. duPont wants to place this property in trust, so that [Joanne A. duPont] will have no rights with respect to the property placed in trust if she subsequently institutes an action for separation or divorce." DuPont III's Exhibit 14. Although duPont III denies this statement as a motive, the Court relied on its credibility based on duPont III's testimony that it was not his position that Brady fraudulently induced him to execute the Trust and that if the Trust was created for tax purposes it seems more likely so than not so that duPont III would emphasize to third parties the exclusive purpose of the Trust to be tax avoidance.

(b) Secondly, duPont III transferred a substantial number of personal assets with a nominal asset value to the corpus of the Trust. The Court infers that the transfer of these assets, such as a soup tureen and plates, duPont III's Exhibit 6, indicates that the Trust was established for purposes other than minimization of transfer tax liability on the settlor's estate.

(c) Finally, duPont III was apprised of the tax cons quences of the transfer in late 1977. Yet in light of h sophistication in financial matters and prior experienc with his father's estate, he continued to utilize and re upon the validity of the Trust. During his divorce pr ceedings with Joanne duPont, Plaintiff relied upon th validity of the Trust to assert that his estate was nomina Finding of Fact No. 19, and to effect the divorce settl ment with Joanne.

16. At the time the Trust was created there was dispute as to transfer tax liability. In his memorandu dated October 26, 1972, Turley concluded that " . . when a pure discretionary trust is created, it is not cle that either a gift or an estate tax is required to be paid DuPont III's Exhibit 14, p. 2. The memorandum ar Turley letter of November 16, 1972, indicates that th parties intended to treat this item as a gift for transf tax purposes. DuPont III's Exhibit 15. Moreover, Brad testified at trial that he told duPont III that a gift ta would probably be due on the transfer. Finally, Plaint introduced the expert testimony of Theodore Kurtz, New York tax attorney, who testified that it was h opinion that a gift tax was due on the transaction.

Although there is some dispute as to the liability, any, no taxing authority, federal or state, has assessed begun an audit of the transaction for purposes of asse ing a tax.

17. During the time the Trust was drafted, revised ar executed (SNB and Garner's Exhibit 5), duPont III viewed the drafts, read the final trust agreement befo signing it and was advised by legal counsel at each st in the formulation and execution of this Trust.

18. In fact, duPont III was specifically advised of the potential tax consequences of the Trust. While duPont III testified that he was advised that the execution of the Trust was not subject to a federal transfer tax, Brady testified that duPont III was informed that the transfer was a taxable event subject to federal gift and possible estate taxes.

In any event, duPont III was aware of the potential tax consequences of the Trust in November, 1977, when he received information from Theodore A. Kurtz, concerning the tax implication of the transfers to the Trust. Additional evidence indicating duPont III's knowledge in 1977 was provided by the testimony of Max Schuette ("Schuette"), former chairman of the Board of SNB.

Schuette testified that he accompanied duPont III to Brady's office either on November 1 or 2, 1977, to assist duPont III terminate Brady's services, see duPont III's Exhibits 49 and 50; SNB and Garner's Exhibit 19. Schuette testified that during their meetings duPont III indicated to Schuette that he was aware of and concerned about the tax consequences of the Trust.

19. Although duPont III was aware of the potential tax problem in 1977, he continued to rely on the Trust and recognize its validity until shortly before filing this lawsuit. In his 1978 divorce proceeding from Joanne duPont, Plaintiff relied upon the validity of the Trust to protect the property from his liability to his spouse upon divorce, SNB Exhibits 13, 14 and 15, including realty located in New York, South Carolina and Maryland. DuPont III testified that in negotiating the final divorce settlement with Joanne A. duPont's lawyers, he utilized the Trust to complete the settlement—specifically, he peti-

tioned the Trust to provide a house for his son and e wife and to pay part of his alimony. DuPont IV Exhib 1 and SNB Exhibit 13.

20. DuPont III, upon creation of the Trust and various times, subsequently executed and delivered to th trustees various deeds, assignments and other instrumen which evince his intent to transfer various assets to th Trust. Thereafter, duPont III had knowledge of pu chases, sales, management and the exercise of title righ by the trustees but did not object or complain.

21. This suit was filed in 1981, over four years aft duPont III learned or should have learned of any mistak that induced him to create the Trust. His sophisticatio and advice from experts indicate that he was aware of th irrevocable conditions of the Trust and the difficulty rescinding or modifying all or part of the provisions the Trust.

C. *Relationship Between Brady, Garner and duPo III.*

22. In his supplemental complaint, duPont III seek to have the Court remove Brady and Garner as truste of the Trust on the grounds that there (a) exists hosti ty between the parties and (2) these trustees do not pe form beneficial functions.

23. There is no evidence in the record to suppo duPont III's contention either that there exist hosti feelings between duPont III and Brady or Garner or th Garner or Brady perform useless or redundant functio Indeed, duPont III testified that he and Brady are st friends and that with regard to the potential tax co sequences, he harbors no hard feelings because "anyo

can make a mistake." Additionally, the record does not contain evidence of the parties' failure to provide beneficial services to the Trust.

D. *Brady's Legal Expenses*

24. DuPont III seeks to have the Court order Brady to reimburse the Trust for legal fees paid by the Trust on his behalf. DuPont III argues that the trustees interests in defense of the Trust are aligned and the need for separate counsel is unnecessary and a waste of Trust assets. Accordingly, Brady should reimburse the Trust for legal fees paid on his behalf which were duplicative of legal work performed for SNB and Garner or related to legal preparation of any defense not related to the validity of the Trust.

25. Although presentation of the case did not involve conflicting claims by the trustees, the potential for conflicts between the trustees leads the Court to the conclusion that the decision to retain separate counsel was prudent and reasonable. Moreover, there is no evidence in the record to support a claim that the expenses were duplicative or unrelated to the maintenance of the Trust.

E. *Excessive Trustee Fees.*

26. The trustee compensation provisions of the Trust agreement for the Trust provide, in pertinent part:

> "The compensation of each Trustee shall be seventy-five percent of the following amounts during Settlor's lifetime, and one hundred percent thereafter.
>
> 1. One percent per annum on the first $100,000 of the fair market value on December 31 of the personal property included in the Trust Estate;

2. One-half of one percent per annum on the nex $1,900,000 of the fair market value on Decembe 31 of the personal property included in the Tru Estate;

3. Three-eighths of one percent per annum on th next $3,000,000 of the fair market value on D cember 31 of personal property included in th Trust Estate;

4. One-fourth of one percent per annum on th balance of the fair market value of the persona property included in the Trust Estate;

5. One percent of all distributions of principa cash distributed from the Trust Estate to the ben ficiaries of any trust created in this Agreement;

6. Two percent on the first $2,500, and one pe cent on the balance, of any distributions of incom cash from the Trust Estate to the beneficiaries any trust created in this Agreement.

If John H. Garner is one of the trustees and the are three trustees, the total compensation shall b that to which two trustees would be entitled, wit this total compensation being divided equally amon the three trustees."

27. The evidence indicates that 169.996 acres of lan known at Shaw Bay Farms in Easton, Talbot Count Maryland and 7,218 acres of land known as Nemou Plantation and located in Yemassee, Bedford Count South Carolina were included in the calculation. Add tionally, the 710 shares of stock in a cooperative apar ment at 10 E. 70th St. in New York City were include in the base used to compute trustee fees. SNB and Garn Exhibit 76.

28. According to the agreement, trustees fees are com puted on a base of personal property. Since the proper

known as the Shaw Bay Farms and Nemours Plantation are included in the trustee fee base, the Court finds that trustee fees were miscalculated since these assets were included in the fee base. DuPont III contends that the 710 shares of stock in the New York City cooperative apartment should not be included in the trustee fee base because the asset is realty. The trustees contend that the asset in the Trust is the shares of stock which they argue is personalty.

29. The Court ordered the trustees to submit an accounting of trustee fees based on the asset values[3] indicated on the trust ledgers. The trustee submitted the following accounting to the Court.

Eugene duPont III Irrevocable Trust
Trustee Fee Recalculation
(Based On Values As Per Statements
Less Real Estate)

	Amount Paid	Recalculated Fee (With 10 E. 70th St.)	Recalculated Fee (Without 10 E. 70th St.)
1973	$ 27,735.36	$ 25,225.47	$ 25,225.47
1974	23,503.98	20,309.32	19,510.58
1975	18,663.84	25,490.35	24,691.60
1976	26,354.94	28,981.76	28,126.76
1977	33,600.00	26,962.76	26,164.00
1978	45,094.20	27,565.36	26,766.62
1979	62,137.30	58,117.10	56,804.59
1980	78,242.14	63,599.74	62,287.24
1981	77,844.00	60,844.98	59,532.48
	$393,357.76	$337,096.84	$329,109.34
		$(56,260.92)	$(64,248.42)

3. In this case, duPont III contends that the property in New York and South Carolina—respectively, Harridge House Associates and Nemours Plantation—were in the Trust.

F. *DuPont IV's Counterclaim.*

30. DuPont IV seeks to have the Court order duPo
III to convey to the Trust all assets over which he h
possession and control which are recorded as trust asse
Although duPont III testified at trial that his origi
intention was to convey all his personal assets to t
Trust, his property known as Nemours Plantation,
limited partnership interest in Harridge House Associa
and his stock in General Motors, duPont, and Rayche
were never effectively transferred to the Trust.

(a) Nemours Plantation

31. In 1973 duPont III executed three deeds coveri
property in South Carolina. DuPont III Exhibits 8, 9 a
10. These deeds were held by his attorney, Brady,
several years, but formal delivery to the Trust was ne
made. DuPont's wife did not renounce dower righ
duPont III Exhibit 28 and 48, and duPont III continu
to pay local property taxes until 1979, duPont III E
hibit 46. Early in 1979, the trustees requested duPont
execute a consolidated deed covering all his property
Beaufort County, South Carolina. DuPont III refused
sign the consolidated deed and renounced the three dee
signed in 1973. The trustees, without duPont III's kno
edge and notwithstanding his renunciation, duPont
Exhibit 47, 48, recorded the three deeds on August
1979.

(b) Harridge House Associates

32. On February 5, 1973, duPont III signed a do
ment entitled "Assignment" which purported to con
stock in a private corporation Dirridge, Inc. Dirridge, I
once owned an apartment building commonly referred

as the Harridge House, but several years before the creation of the Trust, Dirridge, Inc. was dissolved and its assets were transferred to a limited partnership known as Harridge House Associates. Brady acted as counsel for duPont III at the time Dirridge, Inc. was dissolved and Harridge House Associates was created. He had actual knowledge of the corporate dissolution and the partnership's ownership of the apartment building at the time duPont III executed the Assignment.

33. The Articles of Limited Partnership covering duPont's interest in Harridge House Associates requires that all partners approve any assignment of interest. DuPont III Exhibit 13, Paragraph 6. Aaron Diamond, general partner of Harridge House Associates, never approved an assignment of duPont III's interest in the limited partnership. DuPont III Exhibit 40.

34. Although duPont III originally intended to place these assets in the Trust, the trustees, including his confidant and attorney Brady, did not try to obtain legal title to these properties until duPont III threatened to break the Trust. DuPont III's Exhibits 28, 40, 41 and 48. Indeed, in the case of Harridge House Associates the trustees' actions did not extend to mere failure to complete these transfers as it did in the case of Nemours Plantation but constituted deliberate manipulation of a Trust asset. Brady testified at trial that distributions from Harridge House Associates had been paid since 1972 to SNB and to Brady. When the distributions were paid to Brady he, on different occasions, remitted the proceeds to the Trust and to duPont III. Additionally, distributions from Harridge House Associates were credited directly to the books of duPont III's custodian account with SNB bypassing the Trust. DuPont III Exhibit 42. Again, it was not until duPont III threatened to break the Trust that the

trustees began to clarify title to the Harridge House A ciates. (DuPont III Exhibits 40 and 41). Accordi the Court concludes that Brady and his co-trustees did recognize legal title in the Harridge House Associate the Trust.

(c) Common Stock Properties

35. The final assets that duPont III contends are part of the Trust are the stock in General Motors, du and Raychem. The testimony by Brady indicates these stocks were held by a revocable trust created duPont III on February 10, 1973, with SNB as tru DuPont III Exhibit 1. Although the trustees have phys possession of the stock certificates, duPont III has n executed a valid stock power authorizing a transfer a to formally transfer shares to the Trust. Nevertheless, Pont III's testimony indicating his intention to co these assets to the trust and the ultimate transfer of certificates by SNB nominee indicates that the certific of stock were validly transferred to the Trust as of Fe ary 5, 1973, without protest from duPont III when appeared on an initial schedule of trust assets, DuP III Exhibit 54.

36. Any conclusion of law, in whole or in part, w is deemed a finding of fact is hereby adopted as a find of fact.

Conclusions of Law

1. The Court has subject matter jurisdiction pursu to 28 U.S.C. 1332 (1976).

2. The law of the State of Texas controls the iss presented in this case. *See generally,* 5 Scott, *The Law Trusts,* § 611 (3d ed. 1967).

3. DuPont III brings this action before the Court seeking to rescind, revoke or modify the Trust. At trial duPont III testified on two separate occasions that it was not his position to rescind the Trust but merely to reform or modify the Trust.[4] These judicial admissions by duPont III indicate that he has abandoned his claim to declare the Trust void *ab initio* or invalidate the Trust. Assuming however, that these admissions are insufficient to sustain a finding of abandonment, duPont III's claims for rescission or modification fail nevertheless.

A. *Rescission or Revocation.*

[1] 4. As a general rule the law is clear that where the settlor does not receive consideration for the creation of an inter vivos trust, the trust can be rescinded or reformed for a mistake on the same basis that an outright gift can be rescinded or reformed. *See generally*, RESTATEMENT (SECOND) OF TRUSTS § 222, comment a (1959); 4 Scott, § 333, pp. 2630-31; Annot. 59 A.L.R.2d 1229 (1958).

[2, 3] 5. In Texas a settlor of a trust cannot through judicial action have a trust revoked against the consent of the beneficiary unless a power of revocation has been

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4. DuPont III testified at trial as follows:

"Q. And in fact you have made no provision for [duPont IV] except the provision that you have made by the Trust that you now seek to revoke.

"A. No, I do not wish to revoke it. I want to restructure it.

And again, duPont III expressed a similar idea.

"Q. The point is that you are not trying to break this trust because of any financial straights you are in at this time, are you?

"A. No. This is just to restructure it so that Uncle Sam doesn't get 70 percent of the Trust plus penalties."

In subsequent testimony duPont III did not try to retract these statements or clarify his position. Accordingly, the Court is of the opinion that their plain meaning should stand for duPont III's intent.

reserved. *Monday v. Vance,* 92 Tex. 428, 49 S.W. 5
(1899, error ref'd); *Putnam v. Heissner,* 220 S.W.2d 7
(Tex. Civ. App.—Austin 1949, no writ). *See genera*
Bogert, *The Law of Trusts and Trustees,* § 998, p. 4
(2d ed. 1962). However, where the power of revocat
has been omitted from the trust by mistake, the settlor
have the instrument reformed and can then revoke
trust. 4 Scott, § 332, p. 2624-30. Where the creation
the trust was induced by mistake, the settlor may resc
the trust disposition. *Id.* at § 333.4, p. 2634-37. While
general rule is supported by significant commentary,
Texas court has rescinded or revoked a trust on
ground that the settlor was induced to create the t
by a subjective or objective mistake of law at the t
of its creation. Thus, duPont III's contentions before
Court raise an issue of first impression in Texas.

6. This Court sitting with diversity jurisdiction is c
strained to follow the law of Texas and, based on relev
Texas law and the laws of other states, decide the case
the Supreme Court of Texas would decide this issue
confronted with the question. *See, e.g., Day & Zimm*
man, Inc. v. Challoner, 423 U.S. 3, 4, 96 S. Ct. 167, 1
46 L.Ed.2d 3 (1975) (per curiam); *Wilen Manufac*
ing Co. v. Standard Products Company, 409 F.2d 56,
(5th Cir. 1969); *Insurance Company of North Amer*
v. English, 395 F.2d 854, 860 (5th Cir. 1968); *F*
National Bank of St. Paul v. Trust Company of C
County, 510 F.Supp. 651, 656 (N.D. Ga. 1981).
cordingly, this Court will review the law of rescission
revocation of trusts on the ground of mistake in the
ducement.

7. The evidence required to establish the mistake u
which an instrument will be rescinded or reformed

been described as "absolute" evidence, *Kiser v. Lucas*, 170 Md. 486, 185 A. 441, 446 (Md. 1936) (voluntary deed of trust); "evidence of the most satisfactory character," *Du Pont v. Du Pont*, 19 Del. Ch. 137, 164 A. 238 (Del. 1933) (voluntary trust); and as "clear and convincing evidence." *Pernod v. American National Bank & Trust Co. of Chicago*, 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 (Ill. 1956); "substantial evidence," *Walton v. Bank of California*, 218 Cal. App. 2d 527, 32 Cal. Rptr. 856, 866 (1963).

[4] In this case, the Court is presented with the uncorroborated testimony of the settlor of the trust who claims that but for the mistake of law he would not have created the Trust. The authorities are divided on the weight that the Court should accord the testimony of a settlor of a trust. The position is that revocation should not be given for mistaken omission of a power to revoke solely on the basis of the settlor's testimony. RESTATEMENT (SECOND) OF TRUSTS § 332, comment c (1959), followed by *Pernod, supra.* At least one commentator has rejected this view, taking the position that the trier of fact can weigh the credibility including any self interest of the witness. 4 Palmer, *Law of Restitution* § 18.7, p. 35 (1978). The Court agrees with this latter position, and accordingly, rejects Defendant duPont IV's position that the settlor's testimony inherently should not be accorded any weight.

[5] 8. In a gift situation, the importance of the mistake must be such that it involves "the *essence of the object in view and* [*is*] *not . . . merely incidental.*" The Court must be satisfied that but for the mistake, the complainant would not have assumed the obligation from which he seeks to be relieved." *Walton, supra,* 218 Cal.

App. 2d at 545, 32 Cal. Rptr. at 868 (emphasis original). *See generally,* 4 Palmer, § 18.6(b), p. 29.

9. The alleged mistake in this transaction involves mistake as to the transfer tax consequences of the creati of the Trust. In *Stone v. Stone,* 319 Mich. 194, 29 N.W 2d 271 (Mich. 1947), the Supreme Court of Michiga permitted the settlor of a trust to rescind the trust f a mistake as to tax consequences. In *Stone* the settl created a trust for the sole and specific purpose of d flecting income taxes from his partnership to his childr and thereby reducing the total income tax liability of h family. Subsequently, the Commissioner of the Intern Revenue Service determined that the entire income the partnership must be taxed against the father. Th father sued to rescind the trust on the ground of a mistal of fact and law because of the failure of the plan upo which the transfers were predicated and because of th unfairness that he should be taxed in full when he on owned one-fourth of the partnership. In the only oth case since *Stone* to discuss rescission because of a mistal in the tax consequences, relief was denied. In *Walto supra,* the settlor of an irrevocable inter vivos trust tri to rescind the trust claiming that but for a mistake to the tax liability she would not have created the tru The court held, however, that the plaintiff was motivat to create the trust not for tax purposes but to free herse from the demands of her children and that her ma objective was to place all her assets in trust so that n one could touch them. The estimated tax liability w something incidental to the main purpose and did n "go to the essence of the object in view." The *Walt* court distinguished *Stone, supra,* stating that in *Sto* the trust was created solely for tax benefits whereas

Walton other purposes of the trust were disclosed. In both *Walton* and *Stone* tax liabilities had actually been assessed by the government. *See generally,* 4 Palmer, § 18.7(b), pp. 37-44.

[6] 10. Based on an analysis of relevant precedents, the Court is of the opinion that the Texas Supreme Court when presented squarely with the issue before the Court, would conclude that the following are necessary factors that the Plaintiff must establish for the revocation or rescission of a trust based on unilateral mistake by the settlor as to tax consequences:

> (a) that the settlor's trust was created solely for tax considerations;
>
> (b) that the tax considerations had been definitely changed or frustrated by an actual assessment and determination of liability or by a change in the law by statute or judicial construction which would lead an expert to conclude that a transfer tax liability would more likely than not accrue on this transaction;[5]

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5. DuPont III brought this suit seeking a declaratory judgment that, because he was mistaken as to the tax consequences and advantages of creating the Trust, the Trust should be rescinded, revoked, or modified. Such relief would require this Court to find the primary purpose for the creation of this Trust was to achieve certain tax benefits and that the tax consequences of creating the Trust were misrepresented to duPont III. To make such a determination, Plaintiff seeks to have the Court make a determination, in declaratory judgment form, that substantial and material unanticipated federal estate or federal gift taxes are due or will become due as a result of the trust transaction. The Internal Revenue Service has not assessed, threatened to assess, or even hinted that it has knowledge of the Trust transaction. Under both the literal terms of the Declaratory Judgments Act, 28 U.S.C. § 2201 and the cases interpreting that section, it is quite clear that federal courts cannot make this determination of tax consequences which is essential to the Plaintiff's claim of mistake. The Declaratory Judgment Act provides:

(c) that the changed tax circumstances amount a material mistake;

(d) that the Plaintiff is able to establish by cl and convincing evidence that but for the mist the Plaintiff would not have entered the transacti and

(e) that at the time Plaintiff knew or had reason know of the mistake he acted immediately to rem his situation.

[7] 11. As to each of the factors discussed abo the Court finds:

In a case of actual controversy within its jurisdiction, *ex with respect to Federal taxes,* any court of the United St upon the filing of an appropriate pleading, may declare rights and other legal relations of any interested party see such declaration, whether or not further relief is or could sought. Any such declaration shall have the force and effec a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (emphasis added). Federal courts have unanimo interpreted the Act to mean what it says and have held that bec of the specific prohibition of § 2201 the court has no power to g declaratory relief based on a determination of whether taxes are *E.g., Mitchell v. Riddell,* 402 F.2d 842 (9th Cir. 1968) (in w numerous cases are cited).

Quite apart from the question of whether there is an "ac controversy" and the express exception of the Declaratory J ment Act removing from the courts the power to declare ri "with respect to federal taxes" the court cannot presum speak for the commissioner or take over his duty to pass t the tax status of organizations. . . .

402 F.2d at 846 quoting from *Jolles Foundation, Inc. v. Mo* 250 F.2d 166 (2d Cir. 1957). One court has noted that "It sh be remembered that it is not possible to obtain a declaratory j ment from a federal court as to whether the gift in question is sul to the gift tax." *Commissioner of Internal Revenue v. Proctor,* F.2d 824, 827 (4th Cir. 1944). Thus, duPont III's request declaratory judgment in this case fails on the merits becaus necessarily seeks a declaration that taxes will be due as a resu the creation of the Trust.

(a) The primary purpose for which duPont III created this Trust was to keep his assets out of the reach of his wife Joanne in the event of a divorce. The Trust was established to provide support for his son, duPont IV, on a nearly equal level as to what had been provided for his other children. The gift tax and estate tax consequences of this Trust were merely incidental considerations to duPont III's primary purposes of placing his assets beyond the reach of his wife in the event of divorce.

(b) There has been no definite assessment or determination that gift taxes or estate taxes will be assessed and due from the establishment of the Trust.

(c) There is sufficient evidence in the record to conclude that the issue of transfer tax liability is in dispute. However, assuming, *arguendo,* that a liability is assessed and determined, the Court is unable to conclude that a material mistake has been comitted by duPont III in the creation and execution of the Trust.

(d) Assuming, *arguendo,* that duPont III is liable for transfer taxes on this conveyance, the Court is not persuaded by clear and convincing evidence that duPont III would not have created the Trust but for his alleged mistake as to tax consequences.

(e) In 1977, duPont III sought, received and understood the advice of independent counsel as to the potential tax consequences relating to the Trust. Additionally, duPont III as an individual sophisticated in financial transactions, knew or should have known of the potential for tax liability in 1977. DuPont III acted over four years after discovery of the relevant information which would lead a reasonable individual to act.

12. Thus, this Court is of the opinion that the Tr
cannot be rescinded or revoked on the ground of mista
in the inducement.

B. *Reformation or Modification.*

13. Alternatively, duPont III seeks to invoke
equitable powers of the Court to modify or reform
trust to include a marital deduction clause, a byp
trust or a tax allocation clause.

14. A single Texas court in two cases has provid
reformation of express inter vivos trusts on the grou
that a unilateral mistake of the settlor was in existen
Brinker v. Wobaco Trust Ltd., 610 S.W.2d 160 (T
Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Ford*
Ford, 492 S.W.2d 376 (Tex. Civ. App.—Texarka
1973, writ ref'd n.r.e.). In both cases cited, howev
the Texarkana Court of Civil Appeals reformed tr
instruments containing scrivener errors which defeated
true intention of the parties so that the instruments
not express the true agreement of the parties. In
present case duPont III claims that the instrument d
not express his true intention—specifically, that the p
visions of the trust were established to minimize or av
transfer taxes on his estate.

[8] 15. It is well settled that where the settlor o
trust receives no consideration for the creation of
trust, a unilateral mistake in an express inter vivos tru
as written, fails to express the true intention or agr
ment of the parties, "equity will grant reformation of
instrument so as to make it correctly express the agr
ment actually made." *Brinker, supra* at 163.

16. In *Brinker* the Texarkana Court of Appeals considered the issue of reformation of a legal instrument and concluded that "[t]he fact that the written instrument is couched in unambiguous language, or that the parties knew what words were used and were aware of their ordinary meaning, or that they were negligent in failing to discover the mistake before signing the instrument, will not preclude relief by reformation." *Id.* at 164 (collecting cases).

17. Plaintiff cites authority of *Roos v. Roos,* 42 Del. Ch. 40, 203 A.2d 140 (1964) and *Irish v. Irish,* 361 Pa. 410, 65 A.2d 345 (1949) for the proposition that reformation has been permitted where a mistake in the expression of an instrument, due to an attorney's drafting error, resulted in retained powers in the settlor or other which would result in adverse tax consequences. However, this is not the case before the Court. In *Roos,* the court permitted reformation of a trust after death of the settlor based on a specific finding that the purpose of the settlor of the trust was to avoid the tax consequences which would result if the trust did not qualify under the marital deduction and the property was included in the spouse's estate. Similarly, in *Irish,* as a result of a scrivener's error, reformation was permitted to include a provision essential to certain tax laws which had been intended but omitted by inadvertence or mistake. These cases are not dispositive of the issue before the Court because they involve a clear case where the settlor's intent was defeated because of a scrivener's error, which is a factual circumstance not present in this case.

[9] 18. In light of these teachings, it is clear that if the Trust did not express the true intentions of duPont

III, the Court exercising its equitable power could ref
the Trust. In this case, however, the Court finds
duPont III knew what he was doing when he created
Trust, that he wanted to protect his assets upon div
from Joanne A. duPont and that he changed his n
subsequent to the divorce. See Finding of Fact No.

C. *Relationship Between Brady, Garner and duP*
III.

[10] 19. Since there is no evidence to support
Pont III's allegations calling for removal of Brady
Garner, the Court concludes that duPont III is not
titled to relief.

[11, 12] 20. A trustee can properly incur such
penses as are expressly authorized by the terms of
trust and such expenses as, although not expressly
thorized, are necessary or appropriate to carry out
purposes of the trust. *Mason v. Mason,* 366 S.W.2d 5
554 (Tex. 1963). Where a trustee properly incurs
penses, he can pay them out of the trust estate an
entitled to a credit for such payments in his accou
On the other hand, where an expense is not prop
incurred the trustee is not entitled to reimbursement
of the trust estate. 3 Scott, §§ 188 and 244.

[13-15] 21. It is the duty of the trustee to def
claims against the trust estate, which if successful wo
cause loss to the trust estate. *See, Mason, supra* at 5
First National Bank of Port Arthur v. Sassine, 556 S.W
116, 117 (Tex. Civ. App.—1977, no writ). Specifica
it is the duty of the trustee to the beneficiaries to prev
the destruction of the trust. Thus, where the settlor se
to rescind the trust on the ground that the settlor

induced by mistake to create the trust, it is the duty of the trustee to defend the trust, and resist proceedings to the extent to which it is reasonable to require him to do so. *Mason, supra* at 54. Reasonable expenses, including those incurred in the employment of attorneys, in defending a trust against an unjustified attack, are payable out of the trust property. TEX. REV. CIV. STAT. ANN. art. 7425b-36 (Vernon's 1960 & Supp. 1982-83). *Van Gorden v. Lunt,* 234 Iowa 832, 13 N.W.2d 341 (1944); *Blackhurst v. Johnson,* 72 F.2d 644 (8th Cir. 1934); *First National Bank of Wichita Falls v. Stricklin,* 347 P.2d 652 (Okl. 1959); 3 Scott § 178; Bogert, § 581 (1981).

[16-18] 22. Generally, an expense is properly incurred when it can be shown that the expense (i) is not excessive in amount, (ii) is beneficial to the beneficiaries and the trust estate and not solely for the benefit of the trustee; and (iii) is not caused by the personal fault or error of the trustee. *See generally, Bogert,* § 801 (1981). *See Birmingham Trust National Bank v. Harrison,* 403 So.2d 224 (Ala. 1981) (per curiam) (co-trustee is entitled to recover attorney fees for separate counsel when incurred in good faith and to protect the trust's interest). Generally, a fiduciary is under a duty to protect an estate from unnecessary expense. *Crowell v. Styler,* 314 Mass. 122, 49 N.E.2d 599 (1943). Specifically, in the case of attorney fees, a trustee is entitled only to reimbursement from the trust estate for fees which constitute "a fair allowance for the professional work necessary to be done in the proper protection of the trustee's interests." *In Re Delamater's Estate,* 51 N.Y.S. 2d 399 (1944), *aff'd,* 292 N.Y. 518, 54 N.E.2d 205 (1944), or "which the trustee, acting reasonably and in

good faith, incurs in defense of litigation charging
with breach of trust." *Grey v. First National Bank
Dallas,* 393 F.2d 371, 387 (5th Cir.), *cert. denied,*
U.S. 961, 89 S. Ct. 398, 21 L.Ed.2d 374 (1968).

[19] 23. DuPont III argues that a trustee may
obtain reimbursement for litigation expenses from
trust estate where those expenses are incurred not
the benefit of the trust estate but for the benefit of
trustee individually. Although a litigation expense
curred to prevent the Defendant's removal as truste
a proper expense performed on behalf of the Trust,
In re Gerber Trust, 117 Mich. App. 1, 323 N.W.2d 5
572 (1982), where legal fees are paid to counsel wh
efforts are principally directed towards protecting
trustee from an expense which does not benefit the t
—in this case it is alleged that Brady has incurred lit
tion expenses to defend against an allegation of ne
gence—those fees must be paid by the trustee, with
reimbursement from the trust estate. *In re Corco
Trusts,* 282 A.2d 653 (1971), *aff'd sub nom., Bank
Trust Company v. Duffy,* 295 A.2d 725 (Del. 1972)

[20-22] Additionally, where litigation results from
fault of the trustee, he is not entitled to charge the
penses of litigation against the trust estate. Thus, wh
a trustee is found to have committed a breach of tr
the trustee is not entitled to attorney's fees for defend
the suit, see, *Matter of Guardianship of Brown,* Ind.A
436 N.E.2d 877, 891 (1982), or where the trustee
gages in obstructive tactics in order to prolong litigat
his legal fees must be borne by him individually. *Apri
April,* 245 A.D. 841, 281 N.Y.S. 538 (1935) (
curiam). Finally, where the trustee engages in such c
duct which requires his removal, he is not entitled to

imbursement from the trust estate for attorney's fees in connection with his resistance to such action. *Miller v. Burford,* 259 Cal.App.2d 536, 66 Cal.Rptr. 756 (1968).

[23] 24. As previously found, duPont III's contentions are not supported by the evidence in this case. Specifically, there is no evidence other than duPont III's conjecture that legal fees paid to counsel to defend Brady against future litigation were incurred in bad faith or for a purpose other than for the benefit of the Trust. Additionally, there is insufficient evidence in the record upon which to sustain a finding that Brady (or SNB or Garner) engaged in obstructive tactics or conduct which would entitle Plaintiff to relief. Accordingly, Plaintiff is not entitled to recovery of attorney fees.

[24] 25. Finally, the allocation of litigation expenses between the corpus and income accounts of the Trust is proper under TEX. REV. CIV. STAT. ANN. art. 7425b-36 (Vernon's 1960 & Supp. 1982-83). *See, Templeton v. Continental Illinois National Bank & Trust Company of Chicago,* 429 F.Supp. 1294, 1304 (N.D. Ill. 1977) (construing Illinois law).

E. *Trustee Fees.*

26. The issue of whether the Trust paid excessive trustee fees was stipulated by the parties and an accounting was rendered by the trustees. The parties, however, dispute the classification of the 710 shares of stock in the cooperative apartment located at 10 E. 70th Street, New York City, New York. DuPont III contends that the property is realty and excluded from the base for computation of trustee fees. Defendants Brady, Garner and SNB contend that the asset conveyed to the Trust was

the 710 shares in a cooperative apartment, which unde New York law, is personalty.

27. The threshold issue before the Court is which la governs the characterization as realty or personalty o the cooperative apartment. Texas conflicts of law princ ples are dispositive of a choice of law issue in diversit cases. *Klaxton Company v. Stentor Electric Manufactu ing, Inc.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 147 (1941).

28. Although the law on this issue is not clearly de fined, several courts have concluded that the law of th situs of the property should govern the issue of charac terization of the property as realty or personalty. *Se Commissioner v. Skaggs*, 122 F.2d 721 (5th Cir. 1941) *cert. denied*, 315 U.S. 811, 62 S. Ct. 796, 86 L.Ed 1210 (1942); *Teas v. Kimball*, 257 F.2d 817 (5th Ci 1958). *See also, Backar v. Western States Producing Co* 382 F.Supp. 1170 (W.D. Tex. 1974), *aff'd*, 547 F.2 876 (1977) (holding that under the RESTATEMEN (SECOND) OF CONFLICTS OF LAWS, the classification o commissions earned on a contract for the sale of oil an gas leases as realty or personalty is governed by the la of the place of execution of the contract notwithstandin the interests of the law of the situs of the property). On commentator, noting the *Backar* decision in *Annual Su vey of Texas Law: Conflicts of Laws*, 30 S.W.L.J. 268 concluded that the *Backar* Court misread the law and tha the law of the situs should govern the classification of th property as realty or personalty.

[25] The RESTATEMENT (SECOND) OF CONFLICTS O LAWS, § 222, comment g ("Restatement"), provides tha

property will be classified as a movable or immovable based on the law selected by application of the principles stated in § 7. Based on the cited precedent and the principles of the Restatement § 7, the Court concludes that the jurisdiction with the most significant relationships to the cooperative property is New York and the law of the State of New York should apply to the characterization issue. *Cf, Gutierrez v. Collins,* 583 S.W.2d 312 (Tex. 1979) (adopting most significant relations test of the Restatement in tort cases).

[26] 29. Under the law of the State of New York, shares of a cooperative apartment corporation are classified as personalty. *See Stockton v. Lucas,* 482 F.2d 979 (Em.App. 1973); *State Tax Commissioner v. Shor,* 53 A.D.2d 814, 385 N.Y.S.2d 290, 291 (1975) (affirming New York Supreme Court's decision, 84 Misc.2d 161, 378 N.Y.S.2d 222 (1975) that shares of a cooperative apartment are not a chattel real within the meaning of N.Y. Civ. Prac. R. § 105(r) (McKinney Supp. 1982-83), which provides that real property includes chattels real), *aff'd* 43 N.Y.2d 151, 400 N.Y.S.2d 805, 371 N.E.2d 523 (1977). *See also Silverman v. Alcoa Plaza Associates,* 37 A.D.2d 166, 172, 323 N.Y.S.2d 39, 45 (1971) ("cooperative apartment stock is nevertheless stock, like any other stock in a corporation"). *In re Miller's Estate,* 205 Misc. 770, 130 N.Y.S.2d 295 (Sup. Ct. 1954) (shares of stock in cooperative apartment organization considered personalty for estate distribution). Accordingly, the Court concludes that under the terms of the Trust the 710 shares in the cooperative apartment at 10 E. 70th Street should be included in the base for computation of trustee fees.

F. DuPont IV's Counterclaims.

30. DuPont IV seeks to have the Court declare th Trust valid and enforceable and to order duPont III t declare that all assets, which duPont III testified he in tended to convey to the Trust, were validly conveyed an to order duPont III to complete any necessary docu ments effectively to convey the assets. The act that th settlor must perform in order to vest the desired propert in the trustees is a question governed by the law of assign ment and conveyance.

[27] 31. It is well settled that "[w]hen a donor in tends to make a gift but the gift is ineffective in whole o in part for any reason, . . . no relief is available in favo of the intended donee against the donor himself in orde to perfect the gift, 4 Palmer, § 18.8, p. 44,[6] except unde certain conditions such as where the intended donee ha changed his position in reliance on the intended gift, *id* § 18.8, p. 45. *See, Carter v. McDonald,* 172 S.W.2d 76 (Tex. Civ. App.—El Paso, 1942, writ ref'd) (the cou concluded that the grantee of a voluntary conveyanc cannot maintain an action against the grantor to refor an instrument). *See also, Cooper v. Durham,* 565 S.W.2

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6. The commentary continues with a succinct summary of th law and rationale:

> "The reason [for this rule] . . . is fairly apparent: if an intende gift fails to take effect so that title remains in the donor, would be extraordinary for the law to take the position tha because a donor once intended a gift which he failed to com plete, he can be forced to complete it. The property is his, h is privileged to change his mind, and no court, when the issu is seen clearly, will give relief which has the result of compellin a donor to make a private gift merely because he once intende or attempted such a gift. (citation omitted). As one Court sai 'it is merely a failure in a bounty, which, as the grantor wa not bound to make, he is not bound to perfect.'" Quoting *Ada v. McDonald,* 42 Ca. 506, 507 (1871).

308, 313 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (a promise to give is unenforceable without consideration, citing *Fleck v. Baldwin,* 141 Tex. 340, 172 S.W.2d 975 (1943)).

32. In the case before the Court, duPont III contests the conveyances into the Trust of the Nemours Plantation, his limited partnership interest in Harridge House Associates, and his stock certificates in General Motors, duPont and Raychem.

[28] The Court concludes that the transfers of the stock certificates were effective and complete since the evidence indicates that they were held by a SNB nominee and the transfer of the certificates pursuant to duPont III intentions in 1973 would be effected by a bookkeeping entry. However, this does not affect the decision with regard to the Harridge House Associates and the Nemour Plantation.

33. Conveyance of these assets is determined under Texas conflicts of law rules by the law of conveyancing for the situs of the property.[7] *See* Conclusion of Law 28, *infra.*

[29] (a) In the case of Harridge House Associates, the facts indicate that the property was ineffectively conveyed to the Trust since the general partner failed to sign the conveyance, finding of fact 32 and 33, and the trustees failed to recognize the validity of the transfer until 1979, finding of fact 35.

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7. Under Texas conflicts of laws rules, conveyancing of real property is governed by the law of the situs of the property. *See generally,* Conflicts of Laws, 12 Tex. Jur. 3d § 7 (1981). The law of the situs should govern the extent of the settlor's power to convey property and the forms and solemnities necessary to give the conveyance effect. *Cf., Boman v. Gibbs,* 443 S.W.2d 267, 271 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.).

[30] (b) In the case of Nemours Plantation, the fact as found, indicate that the property was not effectivel conveyed to the Trust because duPont III's spouse faile to renounce her dower interests in the property,[8] and th trustees failed to exercise or attempt to exercise contr over the property until 1979, see findings of fact 31.

Since equity will not intervene to compel a grantor t complete a gift, the Court will not compel duPont III t complete the ineffective conveyances in light of his chang of mind.

34. DuPont IV seeks punitive damages against duPon III arguing that the allegations in his complaint are wan ton, malicious and unfounded. The Court disagrees an concludes that duPont IV is not entitled to recovery o punitive damages.

[31] 35. Finally, the Court is of the opinion tha duPont IV is not entitled to recovery of attorney fee especially in light of the fact that litigation expenses hav been charged against the income account of the Trus and duPont III is the income account beneficiary.

36. Any finding of fact, in whole or in part, which deemed a conclusion of law is hereby adopted as a con clusion of law.

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8. DuPont III filed Civil Action No. 81-CP-7-1193 in the Cou of Common Pleas, County of Beaufort, State of South Carolina, seek ing (i) to have a Deeds of Transfer dated January 3, 1973, DuPon III Exhibits 8, 9 and 10, which were recorded under a consolidate deed dated May, 1979, declared null, void and of no effect an (ii) an order requiring the trustees to account for and return an and all monies, if any, received as a result of the transfer of th real estate to the Trust. Defendant Brady filed a motion for sta of collateral proceedings under 28 U.S.C. § 2283 (1976). Since th State of South Carolina has primary interest in determining leg title to the property located within its sovereign jurisdiction, th Court considers it appropriate to defer to the judgment of the Cour of South Carolina to determine title to the Nemours Plantation.

APPENDIX B

Eugene duPONT, III, Plaintiff-Appellee
Cross Appellant,

v.

SOUTHERN NATIONAL BANK OF HOUSTON, TEXAS, Trustees, et al., Defendants-Appellants
Cross Appellees.

No. 84-2043.

United States Court of Appeals, Fifth Circuit.

Sept. 23, 1985.

Settlor of irrevocable trust brought action seeking revocation or modification of trust and removal of trustees. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., 575 F.Supp. 849, granted trustees' motion to dismiss for failure to show a right to relief, but subsequently found that two disputed properties had been ineffectively transferred to trust and still belonged to settlor. Trustees appealed and settlor cross-appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) district court, by initially granting trustees' motion to dismiss but later ruling against them with regard to issue of property transfers in effect denied trustees opportunity to present evidence on issue, in violation of Federal Civil Rule 41(b) and due process clause; (2) district court erred in denying ad litem fees to minor remainderman; (3) settlor did not justify revoking or reforming trust; (4) settlor failed to show either that removal of trustees was warranted due to hostility, or that

litigation expenses of trustees should not have been by trust; and (5) trustees did not abuse their discr by allocating litigation expenses to income interes settlor rather than to principal of trust.

Affirmed in part; vacated and remanded in part.

Appeals from the United States District Court fo Southern District of Texas.

Before CLARK, Chief Judge, GOLDBERG TATE, Circuit Judges.

GOLDBERG, Circuit Judge:

This case illustrates once again the unfortunate that the family, although ideally a nurturer of love affection, often succumbs to the corrosive influen avarice and financial calculation. We chronicle toda attempt at economic filicide involving one of Ame most renowned and wealthy families—the duPonts. partriarch of the family, Eugene duPont III, seeks thi this suit to revoke an irrevocable Trust whose prin beneficiary is his son, Eugene duPont IV. Accordi the findings of the court below, duPont III estab the Trust largely to prevent his then-wife, Joanne A Pont, from obtaining his property in the event of vorce. Having since divorced Joanne duPont and r ried, duPont III now wishes to return the Trust pro to his own control.

The district court, after hearing duPont III's evi orally granted the Trustees' Rule 41(b) motion to di for failure to show a right to relief. Fed. R. Civ. P. 4

When it entered its Findings of Fact and Conclusions of Law, however, the district court found that two disputed properties had been ineffectively transferred to the Trust and therefore still belonged to duPont III. In reaching this conclusion, the district court, without hearing the Trustees' evidence, granted duPont III a substantial portion of his claim.

The issues before us on appeal, like the family squabble underlying them, are messy. On the one hand, the Trustees and duPont IV argue that they were denied their right to litigate the ownership of the disputed properties. They contend, in addition, (1) that duPont III is judicially and equitably estopped from arguing that the property transfers were ineffective, (2) that the property transfers were valid as a matter of law, and (3) that the district court erred in denying ad litem fees and taxing costs to duPont IV.[1] DuPont III meanwhile cross-appeals from the district court's decision (1) that the Trust is valid, (2) that the Trustees should not be removed on the ground of hostility, and (3) that the litigation expenses of the Trustees were properly chargeable to the Trust, and, in particular, to Trust income rather than principal.

We conclude that the district court erred in invalidating the property transfers without allowing the appellants an opportunity to present their evidence, and therefore vacate and remand this portion of the district court's opinion. We also remand to the district court the issue of duPont IV's ad litem fees. In all respects, we affirm the decision of the district court.

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1. This issue is raised only by duPont IV and is neither joined nor opposed by the Trustees.

I

In December 1972, Eugene duPont III, one of the h
to the duPont de Nemours fortune, established an irrev
able Trust for the benefit of himself, his then-wife, Joa
duPont, and his only son, duPont IV. The Trust provi
for discretionary distributions of income by the Trust
to duPont III during his lifetime, and discretionary dis
butions of income and principal after his death to duP
IV, duPont IV's issue, and Joanne duPont if she was
married to duPont III at his death. The Trust instrum
appointed Southern National Bank of Houston ("
Bank") and Edward J. Brady as Trustees; John H. Ga
ner was also later appointed as Trustee when he resig
from his position at the Bank. By its terms, the Trust
to be governed by Texas law. Through the time of t
the Trustees had made discretionary payments of
entire net income of the Trust to duPont III.

The assets of the Trust initially consisted of stock
General Motors Corporation and E.I. duPont de Nemo
Corporation. In 1973, duPont III attempted to trans
two additional assets to the Trust: (1) the Nemours Pl
tation in South Carolina, and (2) the Harridge House
New York City. These properties allegedly have a va
of approximately $22 million, more than two-thirds
total value of the Trust. The transfer of Nemours Pla
tion was accomplished by means of the execution and
livery of three deeds naming the Trustees as grantees; t
of Harridge House by means of a written assignment
duPont III's partnership interest in the property. DuP
III now claims that these transfers were defective and t
they were not formalized by the Trustees until 1979,
which time duPont III had changed his mind about
transfers.

In October 1978, duPont III and his wife were divorced and duPont III remarried shortly thereafter. During the divorce proceedings, duPont III allegedly claimed that the Nemours and Harridge House properties belonged to the Trust and therefore could not be part of the divorce settlement. Excluding these properties, duPont III's personal liabilities exceeded his assets and, accordingly, the divorce settlement was (relatively speaking) quite small. Joanne duPont received $70,000 in alimony and $10,000 in child-support per year, as compared to duPont III's average Trust income of $1.1 million.

Following the divorce and remarriage, duPont III brought suit against the Trustees and various income and contingent beneficiaries and remaindermen of the Trust, including duPont IV, seeking to rescind or reform the Trust. According to duPont III, the Trust was established to achieve certain tax benefits—in particular, to allow him to provide for duPont IV's inheritance without paying gift or estate taxes—which will not in fact be realized. DuPont III argued that the Trust should therefore be rescinded or reformed because it was based on a mistake and its purpose had been frustrated. Alternatively, duPont III argued that the transfers of Nemours Plantation and Harridge House to the Trust were invalid. He also sought to remove the Trustees on the ground of hostility, and disputed certain payments by the Trustees of trustee fees and litigation expenses. The Trustees and duPont IV counterclaimed for a declaratory judgment that the transfers of property to the Trust by duPont III were valid and that the Trust's title to these properties was free of any cloud.

A trial before the district court commenced on November 29, 1982. At the close of duPont III's case in

chief, the defendants moved to dismiss the suit pur
to Fed. R. Civ. P. 41(b) on the ground that duPo
had failed to establish that the Trust was invalic
that he was estopped from disputing the validity c
property transfers. The district court orally grante
defendants' motion and adjourned the trial. In its
ruling, the district court stated that the Trust shou
enforced since there was no mistake or frustratic
purpose; it did not explicitly refer to that part c
defendants' motion concerning the validity of the Ner
and Harridge House property transfers.

On September 27, 1983, ten months after the tria
adjourned, the district court issued its memora
opinion. *DuPont v. Southern National Bank,* 575 F.
849 (S.D. Tex. 1983). The court held in favor c
Trustees concerning the validity of the Trust. Hov
it also held that title to Nemours Plantation and Ha
House had not been effectively transferred to the
and that these properties therefore still belonged to du
III.

After the district court denied the defendants'
judgment motions, the defendants brought the pr
appeal and duPont III cross-appealed.

II

A

[1, 2] Rule 41(b) of the Federal Rules of Civil
cedure provides:

> After the plaintiff, in an action tried by the
> without a jury, has completed the presentation
> evidence, the defendant, without waiving his
> to offer evidence in the event the motion i

> granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

A dismissal under Rule 41(b) differs from a directed verdict in a jury trial in that the court need not determine that the defendant is entitled to judgment as a matter of law. 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.13(4) at 41-177 to 41-179 (2d ed. 1985). Instead, as the finder of fact, the court may resolve disputed issues of fact. A Rule 41(b) dismissal is warranted when the district court, even before hearing the defendant's evidence, determines that the plaintiff has failed to offer persuasive evidence regarding the necessary elements of his case.

In the present suit, the Trustees and duPont IV made a Rule 41(b) motion at the close of duPont III's evidence. This motion explicitly covered all aspects of duPont III's claim, including the validity of the Trust, the effectiveness of the transfers of property to the Trust, the removal of the Trustees, and the payment of litigation expenses by the Trustees. 12 Rec. at 6-12.[2] The district court orally granted the motion, stating:

> I have heard the evidence and find as a fact that the purposes of this Trust have not been frustrated, because I think the purposes of it were accomplished.

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2. Prior to the appellants' Rule 41(b) motion, the parties stipulated that Trustee fees had been incorrectly calculated. The appellants' Rule 41(b) motion thus did not embrace duPont III's claim regarding excessive trustee fees, and the appellants do not challenge the district court's award of $56,260.92 to duPont III on this issue.

> I don't think we have a situation here other than that, from the evidence. I find as a fact that it is more likely than not true that Mr. duPont knew exactly what he was doing when he did this and he simply changed his mind, so I am going to grant the motion. We will be in adjournment.

12 Rec. at 16-17. In granting the motion, the district court gave no indication that it was not granting the motion *in toto*. The court simply granted the motion and adjourned the trial. The appellants were thus justified in thinking that all aspects of duPont III's claim had been resolved in their favor.

[3] Nevertheless, when the district court issued its memorandum opinion ten months later, it found that, although the Trust was valid, the transfers to the Trust of Nemours Plantation and Harridge House were not. *DuPont*, 575 F.Supp. at 865-66. In making this determination, the district court effectively granted a substantial portion of duPont III's claim. This was erroneous, since Rule 41(b) permits the court to dismiss the plaintiff's claim but does not allow it to render judgment in favor of the plaintiff. Fed. R. Civ. P. 41(b) ("The court . . . may . . . render judgment against the plaintiff *or* may decline to render any judgment until the close of all the evidence.") (emphasis added). Indeed, Rule 41(b) specifically provides that in making a Rule 41(b) motion, the defendant does not waive his right to offer evidence in the event that the motion is denied. The district court, in violation of this provision, gave the Trustees no opportunity to present their evidence even though it implicitly denied a portion of their motion to dismiss.

DuPont III argues that the appellants knew that the district court's oral ruling was limited in scope, and there-

fore should have objected to the ruling immediately rather than wait ten months until the district court entered its memorandum opinion. According to duPont III, the appellants made a strategic decision to rest on the court's ruling rather than put on their evidence.[3] DuPont III, however, adduces no evidence in support of this contention. In our view, the appellants would have had to be clairvoyant to realize that the district court's ruling would be partially adverse. A party must act to protect his rights —but he cannot be charged with extrasensory perception.

DuPont III also argues that the district court's decision to render judgment without hearing any additional evidence was a reasonable exercise of the court's discretion to exclude duplicative testimony. He claims that all of the appellants' evidence was heard at trial, and that the appellants have not alleged what additional evidence they would have presented. This argument is without merit. Even were we to interpret the district court's actions as a discretionary decision to exclude the appellants' evidence as duplicative, the district court's discretion does not extend to ruling, in advance, that the appellants' entire case is duplicative. Here, the appellants never had an opportunity to introduce numerous exhibits into evidence and ten of the witnesses listed in their pretrial order never testified for either side. Moreover, while several of the appellants' witnesses did testify, the appellants' attorneys

3. Although duPont III does not explain what strategic purpose might have been served by the appellants' decision not to put on their evidence, we assume that duPont III is arguing that the appellants elected to stand on their motion and appeal from the court's partially adverse ruling rather than to waive the motion and proceed with their case. For the reasons discussed in the text, we reject this argument. However, as discussed in Part II.B below, we do agree that the appellants, on remand, must either appeal from the district court's adverse ruling or put on their evidence; they cannot do both.

specifically reserved their questions for these witnesses until the witnesses were recalled during the presentation of the appellants' case. As a result, the appellants never had a chance to establish a number of elements of their case—for example, that duPont III stated under oath in a prior judicial proceeding that Nemours Plantation and Harridge House belonged to the Trust.

[4, 5] The district court's actions in rendering partial judgment for duPont III not only runs afoul of Rule 41 (b); it also violates the Due Process Clause of the Constitution. The appellants have a due process right to fully and fairly litigate each issue in their case. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982); *see also Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); *Western Electric Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976). By adjourning the trial and then holding, in part, for duPont III, the district court denied the appellants the opportunity to litigate the issue of whether the property transfers in question were valid. Apparently, the district court believed that while duPont III did not present persuasive evidence that the Trust was invalid, he did present persuasive evidence that the property transfers were invalid. In this event, the court should have granted a partial dismissal and continued the trial on the issue of the validity of the property transfers. The district court's failure to do this denied the appellants due process.[4] *See Carter v. Morehouse Parish School*

4. The district court's decision does not withstand scrutiny any better if it is recharacterized as a partial summary judgment for the plaintiff. DuPont III never made a motion for summary judgment and the appellants therefore were not on notice that they should allege in response which issues of material fact were disputed. Moreover, it seems clear that a number of material facts are in dispute—

Board, 441 F.2d 380 (5th Cir.) (where defendants chose not to present evidence at trial in reliance on district court's oral ruling, court's final order denied due process since it was based on a different ground), *cert. denied*, 404 U.S. 880, 92 S. Ct. 201, 30 L.Ed.2d 161 (1971).[5] We therefore vacate that portion of the district court's opinion which dealt with the property transfers and remand in order for the appellants to offer their evidence.

B

The Trustees and duPont IV argue that we need not remand the case for the presentation of additional evidence since, based on the evidence presented already, they are entitled to a judgment as a matter of law. In effect, the appellants contend that the district court erred in partially denying their Rule 41(b) motion to dismiss.

[6] Given the present posture of the case, we do not pass upon this contention. When a Rule 41(b) motion is denied, the defendant has two alternatives: he can either proceed to present his evidence or he can stand on his motion and bring an appeal. He cannot, however, do both. By presenting evidence, a defendant waives his right to appeal from the denial of his motion to dismiss; by appealing the motion to dismiss, he waives his right to pre-

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for example, whether duPont III alleged successfully in a prior judicial proceeding that the property transfers were valid—and that summary judgment is therefore inappropriate substantively as well as procedurally.

5. DuPont III argues that *Carter* has little weight since it has not been cited in subsequent cases. However, in our view the paucity of citations to *Carter* more likely results from the fact that district courts rarely rule against a party without at least hearing the party's evidence.

sent evidence should his appeal be denied. *Wealden Corp. v. Schwey*, 482 F.2d 550, 551-52 (5th Cir. 1973); *accord Duval v. Midwest Auto City*, 578 F.2d 721, 724 (8th Cir. 1978); *A. & N. Club v. Great American Insurance Co.*, 404 F.2d 100, 103-04 (6th Cir. 1968); *see also* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.13[1] at 41-167 & nn. 14-16 (2d ed. 1985).

Earlier, we rejected duPont III's argument that the appellants made an election by not presenting evidence after the district court's oral ruling. In our view, the appellants had no reason to believe that the district court's ruling would be partially adverse and that an election was necessary; instead, the appellants believed that they had prevailed. The appellants only learned that the district court was denying part of their Rule 41(b) motion when it entered its memorandum opinion.

When the district court did enter its memorandum opinion, however, an election was necessary. Instead, the appellants attempted to have it both ways: they made motions both for a new trial and to amend the district court's findings of fact and conclusions of law. On appeal, the appellants again argue, on the one hand, that they should be allowed to present their evidence, and, on the other, that the district court erred in denying their motion to dismiss.

By remanding to the district court, we give the appellants the opportunity to present evidence in their behalf. If the appellants are satisfied with the evidence already in the record, and wish to stand on their Rule 41(b) motion, they are free to do so. Thus far, however, the appellants have not clearly indicated that they wish to take this avenue, but have instead contended that they

were denied their day in court. We take the appellants at their word and therefore do not consider at this time their contention that their Rule 41(b) motion should have been granted as a matter of law.

C

Finally, duPont IV argues on his own behalf that the district court erred in denying ad litem fees. On August 6, 1982, the district court appointed Ronald L. Palmer as both guardian and attorney ad litem for duPont IV, who is a minor. 4 Rec. at 556. However, it denied duPont IV's request that expenses be paid from the Trust income on the ground that duPont IV had sufficient assets of his own. *Id.* at 556-57. In its memorandum opinion and final judgment, the district again apparently denied an award of ad litem fees to duPont IV.

[7, 8] The roles of a guardian ad litem and an attorney ad litem differ, and we must consider each separately. A guardian ad litem is, in a sense, an officer of the court. "[He] is not simply counsel to one party in the litigation, but instead plays a hybrid role, adising one or more parties as well as the court." *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994, 102 S. Ct. 1622, 71 L.Ed.2d 855 (1982); *see also Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 725 F.2d 1392, 1400-01 (D.C. Cir. 1984) (Mikva, J., dissenting in part); *Franz v. Buder*, 38 F.2d 605, 606 (8th Cir. 1930); *cf.* Fed. R. Civ. P. 17(c) (authorizing appointment of guardian ad litem by district court). As one court explained, "[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him. The

guardian ad litem is appointed merely to aid and to enable the court to perform that duty of protection." *Richardson v. Tyson,* 110 Wis. 572, 86 N.W. 250, 251 (1901), *quoted in Friends for All Children,* 725 F.2d at 1400. An attorney ad litem, in contrast, serves no special function. He performs the same services as any attorney—giving advice, doing research, and conducting litigation—only for a minor child rather than for an adult.

[9] As an officer of the court, the expenses of a guardian ad litem are properly taxable as costs pursuant to Fed. R. Civ. p. 54(d). *Schneider,* 658 F.2d at 854-55; *Franz,* 38 F.2d at 606-07; *Friends for All Children, Inc. v. Lockheed Aircraft Corp.,* 533 F.Supp. 895, 900-01 (D.D.C. 1982), *rev'd on other grounds,* 725 F.2d 1392 (D.C. Cir. 1984); *Panitch v. Wisconsin,* 451 F.Supp. 132 (E.D. Wis. 1978).[6] In the present case, the district court did not specifically rule on whether duPont IV's guardian ad litem fees could be included as costs. It simply ordered duPont III to pay the defendants' costs offset by duPont III's costs relating to the issue of excessive trustee fees, on which duPont III had prevailed. 1 Rec. at 157. On remand, the district court should determine whether duPont IV is entitled to an award of costs for his guardian ad litem fees. If the district court determines, in the exercise of its discretion, that an award of costs is not warranted despite duPont IV's prevailing party status, it must state its reasons for this conclusion. *Schwarz v. Folloder,*

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6. To the extent that awards of guardian ad litem fees in diversity cases depend on the applicable state law, *see* 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 17.26 at 17-283 (2d ed. 1985); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1570 at 778 (1971), our conclusion is consistent with Texas law, *Minns v. Minns,* 615 S.W.2d 893, 897 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dism'd).

767 F.2d 125, 131-32 (5th Cir. 1985). If, on the other hand, the court determines to follow the normal presumption in favor of an award of costs to the prevailing party, it should calculate these costs. In any event, we agree with duPont IV that his award of costs should not be offset by the plaintiff's costs relating to the excessive fee issue, since duPont IV was not a party to this issue.

[10-12] We also agree with duPont IV that his attorney ad litem expenses are taxable to the Trust. Unlike guardian ad litem fees, attorney ad litem fees cannot be assessed as costs since the attorney ad litem performs the ordinary services of an attorney; he does not act as an officer of the court. *Franz,* 38 F.2d at 606-07; *Friends for All Children,* 533 F.Supp. at 903. *But cf. Schneider,* 658 F.2d at 855 (responsibilities of guardian ad litem may include legal research and analysis; therefore allowance of legal expenses as costs is within discretion of trial court). His expenses are no more assessable as costs than are ordinary counsel fees.[7] However, where an attorney ad litem acts to preserve a trust for the benefit of a minor, then his expenses, although not taxable as costs, can be recovered from the trust. *United States v. Equitable Trust Co.,* 283 U.S. 738, 743, 51 S. Ct. 639, 641, 75 L.Ed. 1379 (1931); *Folsom v. McDonald,* 237 F.2d 380, 381-82 (4th Cir. 1956); *Mutual Life Insurance Co. v. Ginsburg,* 228 F.2d 881, 883-84 (3d Cir.), *cert. denied,* 351 U.S. 979, 76 S. Ct. 1050, 100 L.Ed. 1495 (1956). As the Supreme Court stated in *Equitable Trust,*

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7. Because in the present case the same person acted as guardian and as attorney ad litem, the district court must differentiate between the expenses incurred by him in his dual capacities. As discussed in the text, his expenses as guardian ad litem are normally taxable against duPont III as costs; his expenses as attorney ad litem are taxable against the Trust.

> It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. "Such a rule of practice," it has been said, "is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress."

283 U.S. at 744, 51 S. Ct. at 641 (quoting *Voorhees v. Polhemus,* 36 N.J.Eq. 456, 458).

[13] The district court denied duPont IV his attorney ad litem fees, giving as its only reason that "litigation expenses have been charged against the income account of the Trust and duPont III is the income account beneficiary." *DuPont,* 575 F.Supp. at 866. Apparently, the court believed that if it taxed duPont IV's attorney ad litem expenses to the Trust, it would in effect be taxing the fees against duPont III, in violation of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975), which proscribes awards of attorney fees absent specific statutory authority. If this was the district court's concern, then the court should have ordered that attorney ad litem expenses be paid from the principal rather than from the income of the Trust. It should not have denied these fees altogether.

DuPont III argues that the services provided by the guardian and attorney ad litem were duplicative, excessive, and unreasonable, primarily because the Trustees

and duPont IV had identical interests in defending the suit and pursued a unified, common defense. The district court, however, never found that the ad litem fees were duplicative or excessive, and we do not believe that they were. DuPont IV's interest as one beneficiary of the Trust was not identical to those of the Trustees, and appointment of a guardian ad litem to protect duPont IV's interest was therefore warranted, as the district court itself implicitly recognized in making the appointment. We therefore order the district court to calculate appropriate attorney fees and to tax these fees to the Trust.

III

In his cross-appeal, duPont III argues that the district court erred in four respects: (1) by upholding the validity of the Trust; (2) by refusing to remove the Trustees; (3) by awarding excessive attorney fees; and (4) by holding that the Trustees could properly pay their litigation expenses from Trust income. We disagree with all but the last of these arguments.

A

[14] DuPont III argues at length that the Trust was based on a mistake of fact and therefore should be rescinded or reformed. The starting point of his analysis is that his primary motive in creating the Trust was to achieve certain tax benefits—tax benefits which he claims will not, in fact, be realized. In its memorandum opinion, the district court rejected duPont III's account of the Trust's purpose, holding that the tax benefits of the Trust were incidental to its creation. *DuPont,* 575 F.Supp. at 861. If found instead, that the Trust was created (1) to prevent duPont III's then-wife, Joanne duPont, from ob-

taining his property in the event of a divorce; and (2) to provide for his son, duPont IV, on an economic level equal to that which had already been provided to his children by previous marriages. *Id.* at 854. On appeal, duPont III argues that these findings are clearly erroneous.[8]

The testimony before the trial court was conflicting with regard to the purpose of the Trust. On the one hand, duPont III testified that he established the Trust both to provide for his son and to minimize the tax liability of his estate. 7 Rec. at 11-13, 21, 101. He claimed that he would not have formed the Trust if he knew then what he knows now about its tax consequences. *Id.* at 15, 18, 21, 40. On the other hand, Edward Brady—duPont III's lawyer when the Trust was formed as well as his close personal friend and advisor—testified that duPont III established the Trust to keep his property from his wife and that tax considerations were irrelevant. 10 Rec. at 24-26. It was the responsibility of the district court to evaluate the credibility of these witnesses and to weigh their conflicting testimony. The district court chose to accept Brady's version, which it found "clear and convincing," *DuPont*, 575 F.Supp. at 854, and which it noted was supported (1) by a memorandum written at the time by one of duPont III's other lawyers, (2) by the fact that duPont transferred to the Trust a substantial number of assets with a nominal asset value but a high personal value, such as a soup tureen and plates; and (3) by the fact that although duPont III was apprised of the true

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8. Although duPont III discusses at length the law governing rescission of a Trust for mistake and frustration of purpose, he does not point to any errors in the test applied by the district court. Instead, duPont III argues that the district court's legal analysis was erroneous only in that it failed to consider his improvidence and fiduciary duty arguments. *See* Brief for Cross-Appellant at 39.

tax consequences of the Trust in 1977, he did not seek to rescind the Trust but instead continued to rely on its validity, particularly during his divorce proceedings with Joanne duPont. *Id.* at 854-55. Given this evidence, we are not left with the "definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746 (1948), and therefore uphold the district court's finding regarding the purpose of the Trust.[9]

[15] DuPont III argues additionally that the Trust should be rescinded or modified on the ground of improvidence. With impressive chutzpah, he claims that he has put himself in a difficult financial position by being overly generous and that we should regard his plight with a "benign spirit." Brief for Cross-Appellant at 34. Although this argument is less audacious than that of the father who, after murdering his son, claims that the purpose of the son's trust has been frustrated, we are unable to summon much benignity on duPont III's behalf. DuPont III points to no Texas cases where an irrevocable trust has been rescinded or modified on the ground of improvidence. Moreover, although he asserted in his pleadings that the Trust should be rescinded because of improvidence, he testified at trial that he was not trying to break the Trust because of financial straits. 7 Rec. at 136. Given his current income of approximately one million dollars per year, *id.* at 135, we would tend to agree. We therefore do not believe that duPont III is entitled to this type of equitable relief.

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9. Because we agree with the district court that the Trust was not induced by a mistake, we need not consider the alternative rationale of the district court that duPont III's suit is premature since taxes have not yet been assessed on the Trust. *See DuPont*, 575 F.Supp. at 861 n.5.

[16] Finally, duPont III argues that the Trust should be rescinded because the Trustees, in advising him to establish the Trust, made inadequate disclosures of the effects of the Trust and abused their confidential relationship. In particular, duPont III claims that his attorney, Edward Brady, engaged in self-dealing by influencing him to form a trust from which Brady, as trustee, receives substantial fees. Because this argument was not made to the court below, we do not consider it here. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1117 n. 20 (5th Cir. 1985).

B

DuPont III also seeks to remove the Trustees on the ground of hostility. Although the Trust instrument does not contain any provision for the removal of the Trustees, Section 39 of the Texas Trust Act, Tex. Rev. Civ. Stat. Ann. art. 7425b-39 (Vernon 1960)[10] provides that, on the petition of an interested person, a court may remove

> [t]rustees having materially violated (or attempted to violate) any express trust resulting in an actual financial loss to the trust, or becoming incompetent or insolvent, . . . or for other cause, in the discretion of the court having jurisdiction.

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10. Although the Texas Trust Act was repealed in 1983 by the enactment of the Texas Trust Code, the Act generally continues to govern the Trust in question here, which was established in 1972. Texas Trust Code § 111.006 (Vernon 1984). To the extent that the newly enacted Code applies to duPont III's specific claim for removal of the Trustees, which may be based in part on transactions occurring after the Code took effect on January 1, 1984, the Code provision (§ 113.082) that replaced Art. 7425b-39 is in all material respects identical to Art. 7425b-39. Therefore, decisions construing Art. 7425b-39 remain authoritative.

DuPont III contends that the district court erred in not exercising its authority to remove the Trustees, since, as a result of this lawsuit, relations have deteriorated between duPont and the Trustees.

The Texas Supreme Court recently had occasion to interpret Article 7425b-39 in *Akin v. Dahl,* 661 S.W.2d 911 (Tex. 1983), *cert. denied,* ____U.S.____, 104 S. Ct. 1911, 80 L.Ed.2d 460 (1984). There, several beneficiaries of a discretionary trust brought suit to remove the trustee, claiming that he was hostile to their interest due to their previous guardianship and incompetency proceedings against him. The Supreme Court affirmed the court of appeals's reversal of the district court judgment removing the trustee. The court held that, in order to remove a trustee for hostility, the factfinder must make an affirmative finding that the trustee cannot properly perform his duties. *Id.* at 914. Since the jury had found only that there was a "probability" that the trustee's hostility would affect his performance as trustee, the Court held that removal was unwarranted. In support of this conclusion, the Court noted that the hostility was created by the beneficiaries, and stated, "[T]his Court will not sanction the creation of hostility by a beneficiary in order to effectuate the removal of a trustee." *Id.*

In the present case, the facts are substantially less convincing on the issue of hostility than in *Akin,* where the Texas Supreme Court held that removal was unwarranted. In *Akin,* the trustee's daughter and son-in-law, both of whom were beneficiaries of the trust, had sought to commit the trustee involuntarily in a hospital for incompetency, and the trustee had successfully brought a malicious prosecution suit in response. 661 S.W.2d at 919. Here, in

contrast, the purported hostility arose merely from duPont's suit to rescind the Trust.

[17, 18] After hearing duPont III's evidence, the trial court found as a fact that there was no hostility between duPont III and the Trustees, *DuPont,* 575 F.Supp. at 856 (Finding of Fact 23), and therefore declined to remove the Trustees. We are unable to say that the court's conclusion is clearly erroneous. DuPont III presented little direct evidence at trial of hostility. Instead, he attempted to infer the existence of hostility from the actions of the Trustees in paying litigation expenses from the income rather than the principal of the Trust, and in charging excessive trustee fees. The district court was in the best position to evaluate this evidence and to determine whether it demonstrated hostility. Moreover, in the present case as in *Akin,* the hostility that exists was created primarily by the beneficiary, through his attempt to invalidate the Trust. In conformity with *Akin,* we "will not sanction the creation of hostility by a beneficiary in order to effectuate the removal of a trustee." *Id.* at 914. We therefore affirm the district court's denial of duPont III's request to remove the Trustees.[11]

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11. In a belated effort to bypass the district court's finding that no hostility exists between duPont III and the Trustees, duPont III argues for the first time in his reply brief that removal is warranted due to the Trustees' mismanagement of Trust assets, regardless of the existence of hostility. Even were we to consider this untimely argument, however, our conclusion would remain the same. In *Brault v. Bigham,* 493 S.W.2d 576 (Tex. Civ. App.—Waco [10th Dist.] 1973, writ ref'd n.r.e.), on which duPont III relies, the trustee had attempted to appropriate the assets of the trust for her own use, and the district court ordered her removal. The court of civil appeals, applying the extremely deferential abuse-of-discretion standard, affirmed. *Id.* at 579. Here, in contrast, duPont III alleges merely that the Trustees mismanaged the assets of the Trust, not that they repudiated the Trust by attempting to appropriate its assets. Nothing in *Brault* indicates that a district court decision refusing to remove the trustees, in this situation, is erroneous.

C

[19] DuPont III next questions the district court's ruling that the Trustees may charge all of their litigation expenses—including their attorney fees—to the Trust. Generally, a trustee is entitled to reimbursement from the trust estate for expenses "which the trustee, acting reasonably and in good faith, incurs in defense of litigation charging him with a breach of trust." *Grey v. First National Bank,* 393 F.2d 371, 387 (5th Cir.) (applying Texas law), *cert. denied,* 393 U.S. 961, 89 S. Ct. 398, 21 L.Ed.2d 374 (1968). DuPont III claims, however, that we should not apply this rule, since the expenses incurred by the Trustees—and Brady in particular—were for the benefit of the Trustees individually rather than for the benefit of the Trust estate. According to duPont III, Brady was interested primarily in defending himself against allegations of negligence and breach of fiduciary duty. Moreover, duPont III argues that the litigation expenses incurred by the Trustees were duplicative and excessive, since the Trustees had identical interests yet employed separate counsel.

[20] The district court, after carefully considering these arguments, found that the Trustees' decision to retain separate counsel was "prudent and reasonable," and that there was "no evidence in the record to support a claim that the expenses were duplicative or unrelated to the maintenance of the Trust." *DuPont,* 575 F.Supp. at 856 (Finding of Fact 25). The court also found that "there is no evidence other than duPont III's conjecture that legal fees paid to counsel to defend Brady against future litigation were incurred in bad faith or for a purpose other than for the benefit of the Trust." *Id.* at 864 (Conclusion of Law 24). In contesting these findings,

duPont III points to no evidence in support of his claim; instead, he merely repeats his conclusory assertions that the retention of separate counsel was duplicative and that Brady's legal fees were incurred to defend Brady against personal liability for mismanagement and malfeasance. The district court was in the best position to judge whether the legal fees of the Trustees were incurred reasonably and in good faith, or whether they were duplicative and for the benefit of the Trustees personally. We therefore defer to its conclusion that the Trustees' attorney fees were properly chargeable to the Trust.

D

Finally, duPont III argues that the district court erred in allowing the Trustees to allocate their litigation expenses to the income of the Trust. Under the terms of the Trust, the Trustees have discretion in determining whether to charge expenditures to Trust income or principal. Trust Agreement, Part V(A). However, the Trust also provides that "[w]hen a Trustee is empowered to exercise his judgment or discretion, it shall be exercised reasonably and in good faith with a view toward assuring to the successive beneficiaries full enjoyment of their respective interests and not for the purpose of arbitrarily favoring one over the other." *Id.* at IV(D). DuPont III argues that the Trustees violated this provision by paying litigation expenses from the income rather than from the principal of the Trust, since this allocation arbitrarily favored duPont IV, the remainderman, over duPont III, the current income beneficiary.

[21, 22] Because the Trust instrument does not contain explicit rules for allocating expenses between income

and principal, but instead leaves allocations to the discretion of the Trustees, we review the Trustees' actions only for an abuse of discretion. *See Beaty v. Bales,* 677 S.W.2d 750, 754 (Tex. App.—San Antonio [4th Dist.] 1984, writ ref'd n.r.e.).[12]

[23] Generally, litigation expenses to protect a trust are considered to be extraordinary expenses and should be paid out of trust principal. Restatement, *supra* note 12, § 233 comment g; 3 A. Scott, *supra* note 12, § 233.3 at 1917-18. However, an exception exists when litigation expenses are caused by or are principally for the benefit of the income beneficiary. *Brisacher v. Tracy-Collins Trust Co.,* 277 F.2d 519, 524 (10th Cir. 1960); *Cleveland v. Second National Bank & Trust Co.,* 149 F.2d 466, 470 (6th Cir.), *cert. denied,* 326 U.S. 775, 66 S. Ct. 231, 90 L.Ed. 468 (1945); Annotation, 124 A.L.R. 1183, 1186-87, 1194 (1940); *cf.* G. Bogert, *Law of Trusts and Trustees* § 802 (rev. 2d ed. 1981) (in exercising discretion to allocate expenses, trustee should take account of cause of expenses). This exception is explicitly recognized by the Texas Trust Act, which states that "attorney's fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the

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12. Although the Trust instrument states that the Trustees must exercise their discretion reasonably and in good faith, without arbitrarily favoring one beneficiary over another, Trust Agreement IV(D), this merely makes explicit the equitable principles that would ordinarily be used to evaluate the Trustees' discretionary actions. Whenever discretion is conferred upon a trustee, the trustee must act within the bounds of "a reasonable judgment," Restatement (Second) of Trusts § 187 comment i (1959); 3 A. Scott, *The Law of Trusts* § 187.2 (3d ed. 1967), and has a duty to deal impartially with the beneficiaries of the trust, Restatement, *supra,* §§ 183, 232; 3 A. Scott, *supra,* § 232. Thus, in the present case, the Trust instrument does not alter the standard that we would otherwise use to review the exercise of discretionary power by a trustee.

Supreme Court, U.S.
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No. 85-1310

In The

Supreme Court of the United States

October Term, 1985

EUGENE duPONT III,

Petitioner,

v.

SOUTHERN NATIONAL BANK OF HOUSTON, TEXAS, TRUSTEE, JOHN H. GARNER, TRUSTEE, EDWARD J. BRADY, TRUSTEE, and EUGENE duPONT IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether judgment may be entered against defendants who move for dismissal of the plaintiff's action pursuant to Rule 41(b), where they have not had an opportunity to present their own case?
2. Whether the plaintiff in this case has shown hostility which affects the performance by the Trustees sufficiently to require their removal?
3. Whether the Trustees abused their discretion by allocating litigation expenses in this case to the income account of the Trust?

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COUNTERSTATEMENT OF THE CASE

In this suit, Eugene duPont III ("duPont III"), one of the heirs of the duPont de Nemours fortune, sought to revoke an irrevocable Trust he set up in 1972. DuPont III had married his third wife, Joanne, on August 6, 1970, without signing a prenuptial agreement. Their only child, Eugene duPont IV ("duPont IV"), was born the following March. The marriage was troubled from the outset, and in early 1972, duPont III initiated discussions with Edward J. Brady ("Brady") concerning setting up a trust which would put all of duPont III's assets beyond the reach of Joanne duPont in case of a divorce. At the same time, duPont III wanted to equalize the inheritance of duPont IV, his only son, with that of his sisters, who had been provided for by previous bequests.

On December 14, 1972, duPont III executed the trust document at issue (the "Trust Agreement" or the "Trust"). In 1976, Joanne and Eugene duPont III separated, and in November of 1977, Joanne duPont filed for divorce. In the divorce proceeding, duPont III stated in his deposition and in a sworn financial statement that the assets at issue in this appeal were all owned by the Trust, and that his personal liabilities exceeded his personal assets. The marriage was terminated on October 11, 1978, with Joanne duPont receiving no division, share, or other distribution with regard to the assets at issue in this appeal, based on duPont III's representations that they belonged to the Trust. Furthermore, duPont III was required to pay only $12,000.00 per year child support, although he had an average income from his trusts of over $1.1 million per year. The minor Eugene duPont IV is

not a beneficiary of his father's current will, and no provision has been made for him by his father other than the Trust.

On December 30, 1978, two months after his divorce was final, duPont III married his fourth and present wife, Laura Pate. Thereafter, duPont III began to search for ways to substitute his new wife as a beneficiary of the Trust, or in the alternative, to get some property out of the Trust to give to her. In June of 1981, he filed this suit against Southern National Bank of Houston, Texas, John H. Garner, and Brady, the trustees under the Trust Agreement (the "Trustees"), duPont IV, and the contingent remaindermen.

This case came to trial on November 29, 1982. When duPont III rested his case, the Trustees and duPont IV moved to dismiss, pursuant to Rule 41(b), Federal Rules of Civil Procedure. The district court orally granted the motions, without giving any indication of holding other than against duPont III on all of his claims for relief, and thus in favor of the Trustees and duPont IV on the issue of title to the disputed assets. Ten months later, the district court issued written findings dismissing duPont III's arguments for dissolving the Trust, but holding that the disputed assets, valued at $21.7 million of the total Trust assets of $29.5 million, were not validly transferred to the Trust, and thus belonged to duPont III. The Trustees and duPont IV were never accorded any opportunity to present their own case and testimony on these latter issues.

The Trustees and duPont IV appealed, arguing that judgment could not be entered adverse to defendants under Rule 41(b), and further that even looking only at the evidence presented during the plaintiff duPont III's case,

the defendants were entitled to a judgment dismissing all of the plaintiff's claims under the law of judicial estoppel, equitable estoppel, the real property law of the State of South Carolina, and the partnership law of the State of New York. The court of appeals reversed and remanded for trial the issue of title to the disputed assets, but upheld all other portions of the district court's opinion. *DuPont v. Southern National Bank, et al.*, 771 F.2d 874 (5th Cir. 1985).

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ARGUMENT

I. The court of appeals correctly held that judgment could not be entered adverse to the defendant Trustees and duPont IV before they were allowed to present their case

In the first three points of his Petition for Writ of Certiorari, duPont III complains of the court of appeals' action remanding this cause to the district court in order to allow the defendants to present their evidence. No special or important reason exists for this Court to exercise its discretion to consider this matter, as such action does not conflict with the decisions of any other court or decide any important questions of federal law. Furthermore, any alleged errors can be reviewed in a subsequent appeal after this case has been fully litigated.

As previously noted, the district court granted the defendants' motion to dismiss pursuant to Rule 41(b), Federal Rules of Civil Procedure, at the end of the plaintiff's case, stating:

> THE COURT: Well, as you pointed out, I overruled the [defendants' dismissal] motions prior to trial

> and we held the trial because there were fact questions. I have heard the evidence and find as a fact that the purposes of this Trust have not been frustrated, because I think the purposes of it were accomplished. I don't think we have a situation here other than that, from the evidence. I find as a fact that it is more likely than not true that Mr. DuPont knew exactly what he was doing when he did this and he simply changed his mind, so I am going to grant the motion. We will be in adjournment. (Court adjourned.)

However, the written opinion subsequently issued ten months later effectively gave duPont III most of the relief he desired by gutting the "res" or substance of the Trust.

DuPont III makes the astounding argument that this oral ruling by the district court clearly and unambiguously should have given the Trustees and duPont IV notice that they had lost the majority of their case. As noted by the court of appeals, the defendants would have to have been "clairvoyant" to have anticipated that any part of the subsequent district court opinion would be adverse. *duPont*, 771 F.2d at 880. No reasonable reading of the district court's pronouncement suggests anything other than that the defendants had unequivocally won. DuPont III suggests instead that the lawyers for each of the defendants, all experienced trial counsel, chose not to present any part of their cases, witnesses, or evidence gathered in one-and-one-half years of discovery in this multi-million dollar litigation simply because they "chose to speculate on the outcome of the case by withholding their objection." This suggestion is neither credible nor true.

In his Petition for Certiorari, duPont III argues that the court of appeals opinion conflicts with the requirement

of an objection to preserve error set out in Rule 46, Federal Rules of Civil Procedure, and Rule 103(a), Federal Rules of Evidence. These rules, while in general requiring that objections be made, contemplate that the party has an opportunity to object at the time. Rule 46 expressly provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." Where, as found by the court of appeals, the defendants could not have known that there was any reason for them to object, the rule relied upon by duPont III itself excuses any need for an objection to preserve the error. No conflict exists between the court of appeals ruling and these rules or any other authority, and duPont III cites no conflicting decisions whatsoever.

DuPont III also argues that the defendants' due process complaints were not raised until appeal, and thus cannot be considered. In the first place, the court of appeals ruling can be upheld on the basis of the provisions of Rule 41(b) without reference to the Due Process clause. However, it is clear that the defendants raised objection to the district court's action as soon as they found out that it was adverse, thus preserving their right to appeal therefrom. *See* Motion to Amend Findings of Fact and Conclusions of Law, Motion to Amend Judgment, and Motion for New Trial. Where the action a party desires the court to take has been made obvious, formal objection is not necessary. *Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976). Furthermore, the Federal Rules of Evidence and cases by this Court establish that no objection is necessary where fundamental error or clear errors affecting sub-

stantial rights are involved. Rule 103(d), Federal Rules of Evidence; *Hormel v. Helvering,* 312 U.S. 552, 556-57 (1941); *Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941).

Rather than conflicting with any prior decision, the court of appeals' decision in this case merely followed its own precedent. In *Carter v. Morehouse Parish School Board,* 441 F.2d 380 (5th Cir. 1971), *cert. denied,* 404 U.S. 880 (1971), the district court granted the relief sought by the plaintiff and terminated the proceedings before the presentation of the defendant's case. Reversing the lower court in a per curiam opinion, the Fifth Circuit stated:

> It is our opinion that the district court committed error in choosing not to hear the defendant's evidence in rebuttal. Although appellants made no objection to this procedure, they could not reasonably have been expected to do so. The trial court indicated to appellants that his ruling was to be essentially that the test was an insufficient reason for the Board to take the action which it took. This reasoning requires far different evidence for rebuttal and different argument on appeal than the reasoning in the court's final order that, as a matter of fact plaintiff's dismissal was racially motivated. Had appellants known the real basis of the court's proposed ruling, they might well (would undoubtedly) have chosen to offer evidence in rebuttal. A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process.

Id., 441 F.2d at 382.

DuPont III strains to avoid the application of this precedent by arguing that in *Carter* the court's oral and written rulings were directly contradictory, while in the instant case they were not. As argued above, however, the district court's oral and written rulings in this case are

clearly contradictory unless an unreasonable, "clairvoyant" interpretation is employed. Secondly, duPont III argues that the defendant in *Carter* took affirmative steps to clarify the court's ruling. Again, no such clarification seemed reasonably necessary at the time of the district court's ruling in this case. The district court adjourned the trial, and duPont III does not suggest whether defendants should have continued to present evidence in an empty courtroom, or instead run down the hall after the Court to do so.

Finally, duPont III argues that in *Carter* no evidence had been presented, while "substantial evidence" has been presented in the present case, and only cumulative evidence remained. This representation is flatly wrong. Defendant Brady's pretrial Exhibits 1-10, 12-15 and 18-33 were never offered into evidence. Defendants' witnesses Joanne A. duPont, Edward Turley, Thomas N. Crowell, Thad T. Hucheson, Charles B. Updike, James H. Cook, George D. Solter, Robert B. Barnhouse, Ford Hubbard and George Etter, all of whom were listed in the defendants' pre-trial orders, never testified. Further, the Trustees and duPont IV reserved questions to be asked of their own witnesses who were called by plaintiff until the defense case, which was never presented.

Finally, duPont III makes the argument that a court may enter judgment *sua sponte* against the moving party under Rule 41(b). No authority is cited for this proposition, no case has ever so held, and the language of the rule itself is to the contrary. Instead, duPont III analogizes to cases where summary judgment can be entered *sua sponte* against the moving party. Obviously, there is a critical distinction between a motion for summary judg-

ment and a motion for dismissal, namely, that both parties are allowed to submit evidence on summary judgment, while only the plaintiff's evidence is considered on a motion to dismiss. While a formal motion for summary judgment might not be necessary if both parties have placed their evidence before the court, such is not the case here. A court may not grant judgment against a party *sua sponte* without ever having heard that party's evidence or arguments.

II. The court of appeals correctly held that the Trustees could not be removed at the sole option of duPont III

DuPont III recognizes that institution of litigation, while usually affecting the relationship between a trustee and beneficiary, does not alone justify removal of the trustee—otherwise, any beneficiary could compel removal of any trustee simply by filing suit. Rather, he argues that litigation was only a part of the existing hostility in this case, and that the court of appeals opinion would prevent removal whenever litigation is in any way involved.

The court of appeals made no such blanket declaration, instead holding only that there was evidence to support the district court's finding of fact that in the present case there was insufficient evidence of hostility to remove the Trustees. This holding does not conflict with *Akin v. Dahl*, 661 S.W.2d 911 (Tex. 1983), where the Texas Supreme Court held that there must be a finding that the hostility affects the trustee's performance. *Akin*, 661 S.W.2d at 914. DuPont III testified at trial that he and Brady (one of the Trustees) are still friends and that with regard to the potential tax consequences, he harbors no hard feelings

because "anyone can make a mistake." Additionally, the record does not contain evidence that the Trustees have failed to provide beneficial services to the Trust. The only evidence cited by duPont in support of removal are disputes as to proper calculation of trustees' fees, a point readily conceded by the Trustees when discovered, and as to alleged mismanagement of assets, a charge yet to be established. While this evidence may indicate some differences of opinion, a trustee is expected to exercise independent judgment and not be a mere puppet. As was evident to the district court and the court of appeals, the disagreements between the Trustees and duPont III resulted from the Trustees' refusal to accede to duPont III's demands that the Trust be improperly modified after the fact. This ruling was merely an application of the evidence in this case to a general proposition of law, and does not present any questions of import to his Court.

III. The court of appeals correctly held that litigation expenses were allocable to the Trust's income interest

Both lower courts held that the allocation of litigation expenses was a matter within the Trustees' discretion, and would only be reviewed for abuse of discretion. While duPont III now claims in his brief that it was his intent as settlor to have a regular income stream from the Trust, absolutely no evidence to this effect was introduced at trial or is cited in duPont III's Petition. In fact, all of the evidence introduced at trial requires a presumption to the contrary concerning duPont III's intent, because his frequent protestations that the Trust was set up to avoid gift and estate taxes could only be effectuated if there was no

formal or informal understanding with the Trustees regarding distribution of income to him. 26 U.S.C. 2036(a)(1); *Skinner's Estate v. U.S.*, 197 F.Supp. 726 (E.D. Pa. 1961), *aff'd*, 316 F.2d 517 (3rd Cir. 1963). Furthermore, his intent must be determined from the Trust Agreement itself, which expressly provides that decisions as to charging expenses to income or principal are within the discretion of the Trustees. *DuPont*, 771 F.2d at 886.

Section 36 of the Texas Trust Act follows the Uniform Principal and Income Act in providing that "[a]ll other expenses, including . . . attorney's fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, *unless due to the fault or cause of the tenant*, . . . shall be paid out of principal." Tex.Rev.Civ.Stat. art. 7425b-36 (emphasis added). The attorneys' fees at issue were incurred due to the cause of duPont III, who brought the claims against the Trust in the present action, as well as in duplicative proceedings in South Carolina covering the same issues and the same parties. Both suits were brought by duPont III to void the Trust or remove some of its assets. In both actions, duPont III alone will benefit by recovering the assets if he is successful, and no one other than he has any expectation of benefit from these suits.

Obviously, a decision to charge the income account *exactly* as prescribed by the state statutory principles cannot be an arbitrary one. Under these circumstances it cannot reasonably be argued that the district court was clearly erroneous in concluding that the Trustees did not arbitrarily abuse the discretion which the Trust placed in their hands. This ruling again is merely an application of the

evidence in this case to a general proposition of law, and does not present any questions of import to his Court.

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CONCLUSION

The Trustees and duPont IV believe that the evidence presented by duPont III establishes that he is judicially and equitably estopped from claiming title to the assets at issue in this appeal. Furthermore, the Trustees and duPont IV believe that the real property law of the State of South Carolina and the partnership law of the State of New York also require a finding that these assets belong to the Trust. While the Trustees and duPont IV thus disagree with the court of appeals' decision in not making these findings as a matter of law, such matters can be more quickly and fully determined in the remand of those aspects of this case to trial in the district court, rather than taking them up before this Court. However, should this Court be inclined to grant duPont's Petition for Writ of Certiorari, the Trustees and duPont IV respectfully request that their points of appeal denied by the court of appeals also be considered by this Court, as they provide independent state grounds for reversing the district court's judgment.

For the foregoing reasons, duPont III's Petition for Writ of Certiorari should be in all respects denied.

Respectfully submitted.

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